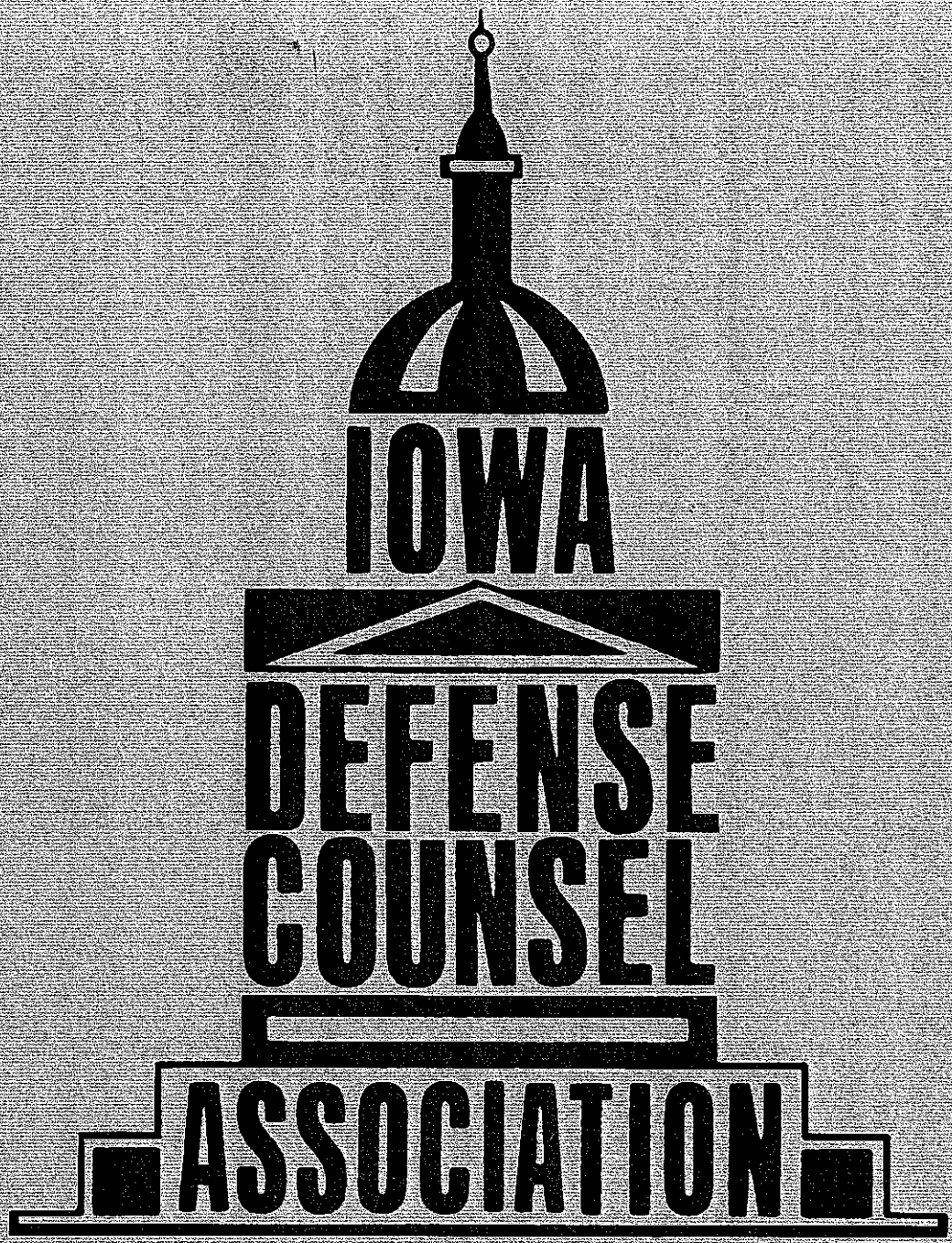

1991
ANNUAL MEETING

OCTOBER 24, 25 & 26, 1991
UNIVERSITY PARK HOLIDAY INN
WEST DES MOINES, IOWA

IOWA DEFENSE COUNSEL ASSOCIATION

October 24, 1991

Dear Members and Guests:

On behalf of the Iowa Defense Counsel Association, please accept a genuine welcome to our 27th Annual Meeting and seminar. President-elect David Hammer has organized an excellent and timely program. The Association is deeply indebted to him for those efforts.

This seminar and the materials in this book are geared to give you the insight of recognized "masters" in the art of trial by jury. Seldom can a lawyer claim to "know it all". We believe the collective wisdom of this fine group of speakers will complement your own skills and serve you well in your courtroom endeavors.

As most of you know, the Iowa Defense Counsel Association members, including its officers, board of directors and the speakers at these meetings are all volunteers. Each has a busy trial practice which makes this effort all the more impressive.

A special "thank" you goes to our arrangements chair, Edward F. Seitzinger. He was the first president and a founder of this fine organization. We are continually blessed by his tireless efforts on behalf of the Association.

Finally, Gene Marlett, our treasurer for the last 10 years, is retiring this year. He has been the financial rock for this Association during his tenure. Any success we've had is due to his astute management. The Association is grateful beyond measure to Gene for his labors. We wish him the best.

If you are not yet a member of the Association, contact any of the officers or directors listed on this letterhead for a membership application.

Sincerely,

Alan Fredregill

Alan E. Fredregill

1991 IDCA Annual Meeting

THURSDAY, OCTOBER 24

8:00-8:30 a.m **Registration**
8:30-8:45 a.m **Welcome by Alan E. Fredregill,** President, Iowa Defense Counsel Assn.
8:45-9:00 a.m. **Robert J. Federman,** President, FICC
9:00-10:00 a.m. **Ethics** - Norman G. Bastemeyer
10:00-10:15 a.m. **Mid-morning Break**

Discovery: Federal and State

10:15-11:00 a.m **Discovery as a Weapon and a Response** Part I - Don N. Kersten
11:00-11:30 a.m **Discovery as a Weapon and a Response** Part II - Claire F. Carlson
11:30-12:15 p.m **The Failure to Let The Plaintiff Discover:** Legal and Ethical Consequences - Thomas D. Hanson

Experts

12:15-1:45 p.m **Luncheon**
Observations of a Sitting Judge
-Honorable Peter van Metre

Other Pre-Trial Matters

1:45-2:30 p.m **Motion Practice** -Kenneth L. Keith
2:30-3:15 p.m. **The Effect of Comparative Fault on the Trial** - Philip J. Willson
3:15-3:30 p.m. **Mid-afternoon Break**
3:30-4:15 p.m. **The Selection, Care & Feeding of Experts and Their Dismemberment** - Patrick M. Roby
4:15-5:00 p.m **The Settlement Alternative -- Some Peculiar Problems:** What Happens When Your Carrier Will Not Accept Your Advice or When Your Client and Carrier Disagree - David L. Phipps
5:00-6:00 p.m. **Hospitality Room Open**
6:00 p.m **Aperitivi** (Cocktails)
7:00 p.m **Italian Fest**

FRIDAY, OCTOBER 25

The Trial

8:30-9:15 a.m **Jury Selection, Method and Ethics** - Raymond R. Stefani, Sr.
9:15-10:00 a.m. **Opening Statement** - Craig D. Warner
10:00-10:15 a.m **Mid-Morning Break**
10:15-11:15 a.m. **Testimonial Objections and Cross-Exam** - Robert G. Allbee
11:15-12:00 **The Art of Summation** - Robert V. P. Waterman, Sr.
12:00-1:30 p.m **Luncheon**
Remarks by the Honorable Arthur A. McGiverin, Chief Justice, Iowa Supreme Court
1:30-2:20 p.m. **Summations in the case of the administrator of the Estate of Humpty Dumpty, Plaintiff, vs. the owners of the wall, and certain medical doctors, d/b/a All the King's Men, Defendants.** The facts as stated are:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the King's horses,
And all the King's men,
Couldn't put Humpty together again.

Suit was brought against the landowner and the treating doctors. The gravamen against the owner is that, although on private property, the wall was attractive to children, was dangerously high and unprotected and had no warning signs. The claim against the doctors is that they failed to exercise the requisite standard of care. The parties defendant have each affirmatively raised the issue of comparative fault of decedent Dumpty

1:30-1:45 p.m. **For the Plaintiff** - Tom Riley
1:45-2:00 p.m **For the Defendant Landowner** - Patrick M. Roby
2:00-2:15 p.m **For the Defendant Doctors** - Kenneth L. Keith
2:15-2:20 p.m. **For the Plaintiff** - Tom Riley

Support Staff: Who Will Succor The Defense Attorney?

2:20-2:45 p.m. **Effective Use of Your Own Staff, Wordsmiths and Forensic Psychologists** - Alanson K. Elgar
2:45-3:00 p.m. **Mid-afternoon Break**
3:00-3:15 p.m **History of IDCA** - Edward F. Seitzinger, IDCA Founding President
3:15-4:00 p.m **What Defense Organizations Can Do To Help The Defense —**
Karl Tippett - ADTA President
David Beck - IADC President
Bob Monnin - DRI President

The Future

4:00-5:00 p.m. **Symposium on the Near-Term Future:** What Those Defense Lawyers Under 40 May Expect During Their Practices - Herbert S. Selby, Edward F. Seitzinger, Marvin F. Heidman, Harold R. Grigg, LeRoy R. Voights, and Ralph W. Gearhart, Moderator
5:00-6:00 p.m **Hospitality Room Open**
6:00 p.m. **Reception**
7:00 p.m. **Annual Banquet**
Boyce Hollerman, Guest Speaker

SATURDAY, OCTOBER 26

9:00-9:15 a.m **Worker's Compensation Update - Part I** - Brad Price
9:15-9:30 a.m **Worker's Compensation Update - Part II** - Jaki K. Samuelson
9:30-10:15 a.m. **Case Update** - Gregory M. Lederer
10:15-10:30 a.m **Mid-morning Break**
10:30-11:00 a.m **Case Update, Continued** - Gregory M. Lederer
11:00-11:30 a.m. **Legislative Report** - E. Kevin Kelly and Herbert S. Selby
11:30-12:00 **Annual Meeting and Election of Officers**

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David L. Hammer
Program Chair

*Deceased

1991 ANNUAL MEETING

TABLE OF CONTENTS

A

THE SETTLEMENT ALTERNATIVE - SOME PECULIAR PROBLEMS: WHAT HAPPENS WHEN YOUR CARRIER WILL NOT ACCEPT YOUR ADVICE OR WHEN YOUR CLIENT AND CARRIER DISAGREE

By: David L. Phipps
Whitfield, Musgrave & Eddy
1300 First Interstate Bank Building
Des Moines, Iowa 50309-4173

I. Warning Signs:

a) Defendants' sympathetic to Plaintiff (collusive suits)
b) Law limits of liability (potential for excess judgment and bad faith claim
c) Multiple parties -- some of whom you have no control over.
(W.C. carriers, subro interests, UM or UIM carriers, etc.)
d) Clients who are adamant about "principle"
e) "Surprise" evidence or developments

II. Maintaining the Proper Perspective

A) Don't make other people's problems yours

1) It isn't your fault that the client didn't buy more insurance
2) You can't help it if the insurance company hasn't adequately evaluated the claim or has an inadequate reserve
3) You must exercise your independent judgment

B) Don't assume that the case will settle or that things will get better

C) Analyze the case one step at a time

1) What is the value of the claim?
2) Can any money be saved by settlement now?
3) Where is the money going to come from?

D) Avoid the non-issues

1) Coverage may or may not be an issue but it isn't your issue
2) The fact that your insured can (or will) take bankruptcy is not relevant
3) Previous demands or offers are irrelevant
4) Sort out the insureds' non-legal reasons to want a settlement

E) Analyze the Plaintiff's objective

1) Can a structure help you get the job done?
2) Is there an emotional agenda?

A

3) Can you bargain with an assignment?
4) How can the insureds' personal attorney help you?

Mechanics

A) Analyze the issue of whether to furnish a financial statement

B) Make sure all concerned parties havethe same information at the same time

C) Don't hesitate to suggest the need for additional counsel

D) Commit the insured to their position

1) If the insured wants the case tried -- document it
2) If the insured wants the case settled -- document the reasons and the factual basis

E) Advise of effects and consequences not just the legal facts

F) Don't assume what others will or won't do -- make all options known

G) Consider face-to-face meetings

1) Involve as many concerned parties as possible
2) Establish a solid personal relationship with your clients
3) Use the opportunities to explore all options and consequences

B

DISCOVERY

PART I

Don N. Kersten

B

DISCOVERY

PART I

Don N. Kersten

Discovery rules are designed to enable a defendant to elicit the basis for a plaintiff's allegations and to prepare defenses to the charges made; they are not designed to permit a plaintiff to make broad-based allegations without any basis for a belief in those allegations and then to invade the defendant's records in an attempt to determine whether or not a cause of action exists.

I

PURPOSE

To aid in preparation for trial. In Interest of D. L., 401 NW2d 201 (Iowa 1986)

to learn facts and opinions:
to supplement pleadings
to aid in instruction requests
to preserve testimony for trial
as a basis for motion for summary judgment (IRCP) 237-240)
to provide underlying documents for witness testimony
to identify inadmissible evidence in support of motion in limine (IRCP 104)
to help determine the real value of the case for settlement purposes
to narrow issues
to eliminate surprise
to discover further information regarding exhibits or witnesses
to secure information to impeach witnesses
to focus all parties' perception as to real facts and issues
to avoid duplication of effort re investigation
to facilitate negotiations by exposing strengths and weaknesses

Discovery is designed to enable preparation for trial and to aid in development of proof.

Pollock v. Deere & Co., 282 NW2d 735, 738

B

IRCP 144 states: Any part of a deposition so far as admissible . . . . may be used upon the trial . . . . against any person who appeared when it was taken or stipulated therefor or had due notice thereof, either:

> 144(c) for any purpose if the court finds that the offeror was unable to procure deponent's presence at the trial by subpoena . . . .
>
> (43 Iowa Law Review 8 (Vestal)), FRCP 32(a).

Iowa Rules of Civil Procedure make no distinction between discovery depositions and depositions to be used at trial. IRCP 140-58.

We are not concerned here with a deposition to perpetuate testimony under the authority of Rule 159-66. The court properly allowed the deposition into evidence under the authority of IRCP 144(c).

Osborn v. Massey Ferguson, Inc., 290 NW2d 893 (Iowa 1980).

Stipulation: May be used for all purposes permitted under the rules.

Rules provide that any deposition may be used at trial.

II

SCOPE
IRCP 125, FRCP 26(b)

1. any matter not privileged which is relevant
2. liability insurance contracts (not applications for insurance)
3. documents prepared in anticipation of litigation only on showing of substantial need, including statements by the party (with protection of legal opinions of attorney)

It is not an objection to interrogatories that the information sought is within the knowledge of the interrogating party. A distinction should not be drawn between facts with or without knowledge of the examining party.

Weiss v. Chrysler Motors Corp., 515 F.2d 449, 456.

B

III

METHODS

IRCP 121, FRCP 26(a),

written interrogatories

request for production

requestion for permission to enter property

request for admission

request for physical or mental examinations

depositions

IV

LIMITATION
(by protective order)

1. discovery sought is unreasonably duplicative

2. discovery sought is obtainable from some other source

3. party seeking discovery has had ample opportunity to obtain the information

4. the discovery sought is unduly burdensome and expensive

5. Our discovery rules afford many areas for the exercise of the trial courts' discretion but do not go so far as to give the trial court under Rule 124 (depositions in sequence) or Rule 123 (protective order) the right to nullify Rule 144(c), such as an order limiting evidence during the discovery process.

Farley v. Seiser, 316 NW2d 857, 858, 859 (Iowa 1982).

B

V

PROTECTIVE ORDERS
IRCP 123, FRCP 26(d)

1. Any order which justice requires to protect a person from annoyance, embarrassment, oppression, undue expense that:

(a) discovery not be had

(b) discovery only on specific terms

(c) method of discovery limited

(d) scope of discovery limited

(e) sequestration of witnesses - Iowa Rules of Evidence 615

2. But authorities are divided on the question whether deposition is public or private. Compare Times Newspaper, Ltd. of Great Britain v. McDonald Douglas Corp., et al, 387 F.Supp 189 (DC Cal 1974) (newspaper not entitled to have reporters present at deposition of American Tel. & Tel. v. Grady, 594 F.2d 594 (4th Cir. 1979) (in the absence of compelling reasons, discovery must take place in public). We seem never to have ruled on the public or private nature of the taking of a deposition but we have consistently accorded the trial courts broad discretion in superintending discovery.

Donovan v. State, 445 NW2d 763, 766 (Iowa 1989).

(f) sealed deposition

(g) trade secrets protected

(h) simultaneous filing of sealed information with the court.

3. Parties are protected from unfair treatment. The rules, "Iowa Rule of Civil Procedure 148(b) and Federal Rule 30(d), protect parties and deponents from examinations "conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the deponent or party". In such a case the court can be asked to enter an order terminating or limiting the examination.

Munzenmaier v. City of Cedar Rapids, 449 NW2d 369, 371 (Iowa 1989).

B

VI

SANCTIONS
IRCP 80(a), FRCP 11

1. Sanctions: The imposition of discovery sanctions by a trial court is discretionary and will not be reversed unless there has been an abuse of discretion.

Sullivan v. Chicago & Northwestern Transportation, 326 NW 320, 324.

2. Discovery sanctions fall into two categories:

(a) Violation of a trial court discovery order (case may be dismissed).

(b) Violation solely of a rule of civil procedure relating to discovery (sanction less than dismissal).

Suckow v. Boone State Bank, 314 NW2d 421-425 (Iowa 1982).

3. The sanction for ignoring a request for admissions is the admission of the matter, rather than dismissal of a case. IRCP 127

Postma v. Sioux Center News.

4. Sanction for failing to comply with a discovery order may be dismissal. 134(b)(2)(C) also 32 ALR 4th 212.

5. When faced with a violation of its discovery order, the court should enter an order to show cause and hold a hearing before dismissing the case or entering a default judgment.

Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977), FRCP 37(b)(2)(A-E).

6. (Due process of the 5th amendment limits the power of the courts to dismiss an action without an opportunity for a hearing). But this is not an absolute rule and a case may be dismissed because of the actions of the parties' lawyers.

The Iowa court has generally found abuse of such discretion of the court only in those cases involving dismissal.

Sullivan v. Chicago & Northwest Co., 326 NW2d 320, 324 (Iowa 1982)

B

VII

SEQUENCE
IRCP 124, FRCP 26(d)

The parties may use any sequence unless the court orders otherwise.

Rule 26(d):

Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. This rule abolished the priority rule, which gave priority to the first party who serves notice of intent to conduct discovery.

Now the courts have "wide discretion" to fashion a discovery schedule in individual cases.

U.S. v. Bartesch, 110 F.R.D. 128 (N.E. Ill 1986)

VIII

DISCOVERY OF EXPERTS
IRCP 125, FRCP 26(b)(4)

1. The facts known and the opinions held by plaintiff's expert to be called at trial may be obtained through:

interrogatory requesting the name, address, subject matter of testimony, list of qualifications, opinion held and facts known by the expert

expert's written opinion must be signed by the expert

deposition of plaintiff's expert

request for production of documents, reports, models, data prepared by the expert which forms a basis for an opinion

2. A party responding to an interrogatory has a continuing duty to supplement a response concerning the identity, subject matter and substance of testimony of an expert witness.

Hubby v. State, 331 NW2d 690, 697 (Iowa 1983)
IRCP 125(a)(2)

3. The trial court has the power to enforce IRCP 125(a)(2) to supplement answers to interrogatories regarding witnesses and may impose sanctions such as excluding evidence of an expert witness or of opinions of experts not disclosed during discovery.

In Interest of D.L., 402 NW2d 203 (Iowa 1986)

4. Rule 125 requires supplementation of answers to interrogatories with the name of experts that plaintiff intends to call. Failure to comply may result in sanctions, the most severe of which is exclusion of an expert as a witness, but exclusion is justified only when prejudice would result.

Lambert v. Sisters of Mercy Health Corp., 369 NW2d 417, 421 (Iowa 1985).

Court excluded expert witness (altered documents expert) for plaintiff's failure to name said expert until two weeks before trial. IRCP 125(c) permits the court discretion to exclude or limit expert's testimony of witnesses named less than thirty days prior to trial. Plaintiffs had information seven or eight months prior to trial of expert's report that the hospital had altered records.

Kilker v. Mulry, 437 NW2d 1 (Iowa 1988).

The failure to supplement does not have to be a "knowing concealment". It makes no difference whether it was due to failure to prepare for trial or to an intentional purpose to gain the benefit of surprise. The rule bars the result without regard to cause except for those beyond control.

White v. Citizens National Bank of Boone, 262 NW2d 812, 816 (Iowa 1978).

7. Expert testimony at trial:

(1) may not be inconsistent with his discovered opinions

(2) expert may express opinions of non-discovered matters

B

An expert's testimony at trial must be consistent and within the scope of his testimony during discovery. IRCP 125(d). A party has a continuing obligation to supplement its answers to interrogatories concerning the substance of expert testimony to be offered at trial. IRCP 125(c). Mercy Hospital v. Hanson, Lind & Meyer, 456 NW2d 666, 670 (Iowa 1990) (with citations). The Iowa court found that the trial court did not abuse its discretion in not excluding the expert's testimony to that given during disovery. Mercy Hospital, page 671.

8. Court may compel disclosure of experts:

   (1) at discovery conference (IRCP 124.2)

   (2) the court's own initiative

9. Expert not expected to be called as witness:

   (1) only if the expert's work products form a basis of the opinions of the expert witness

   (2) only as provided in IRCP 133 (examining physician)

10. Expert fees:

   (1) reasonable fee

   (2) amount not to exceed expert's customary hourly or daily fee

   (3) expert's deposition expenses shall include time spent in travel to and from the deposition, but exclude time spent in preparing for the deposition

11. Misuse of Rule 125:

In a medical malpractice action, defendant doctors named an expert that was to be relied upon by both the defendant hospital and the defendant doctors. Plaintiffs chose not to resist defendant doctors' motion for a directed verdict to avoid the testimony of defendant doctors' expert witness. Hospital subsequently designated said expert and trial court excluded the expert. The Supreme Court granted a new trial and stated:

> "The fact is apparent that a prime reason the Lamberts did not resist the directed verdict was to block out Dr. Zlatnick as a witness in the case - rather than genuine surprise. We do not approve such use of Rule 125".

Lambert v. Sisters of Mercy Health Corp, 369 NW2d 417, 423 (Iowa 1985)

B

IX

DISCOVERY CONFERENCES
IRCP 124.2, FRCP 26(b)

1. Either by court order or upon motion.

2. Motions must include:

   (a) statement of the issues

   (b) proposed plan and schedule

   (c) limitations proposed

   (d) proposed orders

   (e) attorney's statement that he has made a reasonable effort to reach agreement re same

   (f) court may combine discovery conferences with pre-trial conferences. IRCP 136

X

PRE-TRIAL CONFERENCES
IRCP 136(c)

to seek a pre-trial order limiting issues and evidence at trial - based upon discovery

1. Continuances are to be discouraged and attorneys should not take responsibility for more litigation and legal work than they can reasonably handle.

Dept. of General Services v. R. M. Boggs Co., Inc.
336 NW2d 408, 411 (Iowa 1983)

2. Issues raised by the pleadings may be narrowed by the pre-trial conference.

Lamantia v. Sojka, 298 NW2d 245 (Iowa 1980)

B

3. Now with notice pleading, a specific cause of action need not be pleaded. However, fair notice of the claims must be given.

Gosha v. Woller, 288 NW2d 329, 331

4. Pre-trial Order:

(a) by enumerating a defense (a release) during pre-trial conference and the Court's recitation of the same in its pre-trial order, effectuated an amendment to the answer in compliance with Rule 105.

Brunson v. Winter, 443 NW 717, 719 (Iowa 1989)

(b) The trial court can rely upon a plaintiff's narowing of his issues and assuming burdens of proof beyond those contained in his petition, during the pre-trial conference. The trial court can then issue its pre-trial order prescribing finality absent any exception thereto within 10 days of its promulgation, pursuant to IRCP 138. A Rule 138 order can operatively amend a pleading.

(c) Such result is contemplated by Rule 136(a) which states as one possible topic to be considered at pre-trial conference "the necessity or desirability of amending pleadings by formal amendment or pre-trial order".

Gray v. Schlegel, 265 NW2d 156, 158 (with citations)

XI

DISCOVERY - A WEAPON

For the defense attorney, a good offense begins the day you receive the case from the insurance company or client.

1. Informal Discovery:

(a) subrosa investigation of plaintiff.

(b) detailed review of all of plaintiff's medical records to ascertain history of other claims, workers comp or liability.

(c) DOT investigation of other accidents.

(d) court records, investigation of history involving domestic relations, credit, judgments, bankruptcy and criminal record (abstractor, investigator)

(e) if summary judgment is possible, focus on the discovery necessary to support the motion.

(f) the defense lawyer should first prepare for defense, then offense. Obtain as much information with informal discovery as possible, interview witnesses as soon as possible, order photos, secure a sample of the product (attorney-work product).

(g) verify plaintiff's expert's qualifications:
- education
- writings
- teaching positions
- history of testimony (DRI)

2. Formal Discovery:

(a) documents

(b) facts of accident

(c) substantive questions

(d) depositions. What stipulations? "All objections except as to form"? May be used for all purposes permitted under the rules.

(e) production requests

(f) independent medical request (or not)

(g) limiting costs. Telephone - tape recorded by attorneys with stipulation.

3. Challenge Plaintiff's Experts

A. DON'T, unless you have damaging information. Reply on your own.

If you have his report, and your expert agrees, wait until trial to cross examine.

B

B. If you have damaging information about the expert, wait until trial. Verify his C.V. and testimony history.

(1) if in the C.V. - voir dire, the expert before his testimony

(2) if he has testified just the opposite regarding other cases, wait for cross examination to confront him.

XI

CONCLUSION

Note:

(1) Do not let discovery become an end in itself.

(2) Do not let disputes over discovery, such as sanctions, protective orders, technical objections, cloud the real issues and the claims in dispute.

(3) What is the future of discovery?

Professionalism and Procedure Notes on an Empirical Study, David S. Walker, Dean, Drake Law School, 38 Drake Law Review 759.

(4) Use DRI and Iowa Defense Counsel Brief Bank and Expert Lists.

B

XII

PROPOSED AMENDMENTS TO FEDERAL RULES OF DISCOVERY

The Federal Rules were adopted in 1938; no major changes since. Now, proposed amendments are the first comprehensive review since 1938. Substantial changes are proposed in the discovery rules. The amendment has been approved for public comment, oral testimony will be heard on November 21st and the committee will then report. If finally adopted, will be effective December 1, 1993.

26(a)	Discovery Methods - per treaty
(b)(5)	FOREIGN COUNTRY Claims of privilege, protection
28(b)	Foreign country specifications
30(a)	When depositions may be taken
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TABLE SHOWING REARRANGEMENT OF RULES

EXISTING RULE NO.	NEW RULE NO.
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26(c)	30(c)
26(d)	32(a)
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

B

COPIED FROM THE

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF CIVIL PROCEDURE

AND THE

FEDERAL RULES OF EVIDENCE

SUBMITTED BY
DON N. KERSTEN

COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE
UNITED STATES

AUGUST 1991

B

Proposed Amendments.

The various proposals have a common theme and purpose; namely, to change current practices to achieve more effectively the objective stated in Rule 1--the "just, speedy, and inexpensive determination of every [civil] action." Amendments to the rules can and should be made to reduce, if not totally eliminate, the excessive delays and expense involved in many civil cases, particularly in the conduct of discovery, and changes are also needed to make accommodation for the court plans mandated under the Civil Justice Reform Act of 1990. Curtailment and prompt elimination of frivolous claims and defenses serves not only to reduce the burden on litigants, but also to preserve scarce judicial resources for litigants with disputes requiring more extensive court time and attention.

In the course of drafting these proposals, the Advisory Committee received many helpful suggestions from the bench and bar. In considering Rule 11--a subject that has attracted extensive interest--the Committee was greatly assisted by written suggestions received after a call for comments, by discussions during a special public hearing, and by extensive studies conducted by the Federal Judicial Center. The Committee is requesting that these proposals now be formally published, affording a broader opportunity for public comment and hearings.

Fed. R. Civ. P. 1.

In calling for the rules to be construed "and administered" to secure the just, speedy, and inexpensive determination of every civil action, the simple revision highlights the central theme and purpose of the other proposed amendments. Judges and attorneys share the responsibility to see that the rules are utilized to achieve this objective.

Fed. R. Civ. P. 11.

After extensive consideration of practice under current Rule 11, the Committee has concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, are not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should be retained. Many of the initial difficulties have been resolved through case law over the past eight years. Nevertheless, there is support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after

determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The revision is designed to increase the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while at the same time actually reducing the frequency of Rule 11 motions. It does not adopt the suggestions made by many that sanctions be imposed only for willful violations, or be made permissive rather than mandatory. Such changes would be inappropriate in view of modifications in the wording of the obligations--in effect permitting a party, if candid in its papers, to advance innovative theories of law and to make allegations based on information and belief--and in view of the provisions affording a "safe harbor" from Rule 11 motions through the opportunity, after notice, to withdraw voluntarily from unsupportable positions. In light of these changes, violations of the rule would rarely involve conduct that is not either willful or deceptive, and hence some form of sanction should be imposed.

A detailed explanation of the revision is contained in the Committee Notes and will not be repeated here. A brief summary of some of the more significant changes may, however, be useful. The revision not only restates the obligations that a litigant owes to the court before initially signing and filing a pleading, motion, or other document, but also provides that these obligations are of a continuing nature, imposing a duty to withdraw allegations and positions once they become no longer tenable. It briefly indicates the types of sanctions that may be imposed, calling attention to the potential for nonmonetary sanctions, and provides that sanctions should not be more severe than needed to deter comparable improper conduct on the part of similarly situated persons. Sanctions may, under the revision, be imposed on a person or firm responsible for the improper presentation, rather than only on the individual signing a paper. It provides, however, that monetary sanctions may not be imposed on a represented party except when responsible for presentations made for an improper purpose, such as to harass or cause unnecessary delay or expense.

As requested by the Standing Committee, consideration will be given, following receipt of comments, to the question whether Rule 11 should be amended so that it does not apply to discovery motions, requests, responses, and objections in view of the special sanctions provisions applicable to such documents under Rules 26 and 37.

Fed. R. Civ. P. 16.

Most of the proposed amendments to this rule involve technical changes (e.g., using the new title of "magistrate judge" under the Judicial Improvements Act of 1990, and

providing that the date a scheduling order should be entered is measured from the date of appearance of a defendant rather than from the filing of a complaint) or are additions designed to highlight subjects that in particular cases should be considered at pretrial conferences (e.g., schedules for disclosure and discovery, ordering of separate trials under Rule 42(b), and opportunities to utilize new Rules 50 and 52 at trial). In an effort to capture the theme of the various amendments being proposed, the catch-all paragraph of subdivision (c) would be amended by providing that consideration be given at conferences to "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action."

In subdivision (c)(4) the revision lists as a proper subject for consideration "limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence." Courts are encouraged to inquire at conferences into the potential use of expert testimony and impose fair restrictions on the number of expert witnesses, and subject matters of such testimony, before time and expense is wasted by the litigants on marginally helpful, and often redundant and expensive, expert testimony.

In subdivision (c)(9) the revision amplifies the power of the court with respect to various ADR techniques. The additional sentence at the end of subdivision (c) provides that parties, or their representatives or insurers, can be required to attend settlement conferences or participate in ADR proceedings. While the court should be reluctant to order unwilling litigants to participate in such settlement efforts and proceedings, it is important that this power be recognized.

In subdivision (c)(15) the revision explicitly authorizes the court in appropriate cases to impose in advance of trial "a reasonable limit on the length of time allowed for the presentation of evidence or on the number of witnesses or documents that may be presented." Such orders should be entered only when justified by, and tailored to, the needs and circumstances of a particular case. Nevertheless, the goals of Rule 1 involve more than constraints on pretrial procedures, and require that consideration be given in appropriate cases to reasonable limitations affecting the length of trial. When the need for such limits can be determined before trial, unnecessary pretrial expenses can be eliminated and the parties will have a better opportunity to exercise judgment in selecting the evidence to be presented.

Fed. R. Civ. P. 26.

Revised Rule 26 requires litigants to disclose, without any request, three types of basic information that at present are almost invariably obtained through discovery requests or as a result of standard pretrial provisions and local rules. Failure to make the required disclosures can lead not only to imposition of traditional sanctions, but also to preclusion of the use of evidence and notification to the jury that evidence was not disclosed as

required, much as in the situation of spoliation of evidence. The parties are required to update these disclosures on the basis of information learned during the litigation.

Early in the case--within 30 days after a defendant has answered, unless the court sets another time--the parties must identify the persons likely to have significant information about the claims and defenses, must describe the documents likely to bear significantly on these issues, must provide information concerning any damages they claim, and provide insurance information. Formal discovery ordinarily will not commence until after these disclosures have been made. The rule permits the time for disclosure to be accelerated when, for example, answers are being delayed for an extensive period of time awaiting a ruling on a Rule 12 motion.

Later--30 days before trial, unless the court sets another time--the parties must specifically identify the witnesses and the particular documents they may present at trial (except solely for impeachment purposes). Objections to admissibility of listed documents, other than under Fed. R. Evid. 402 and 403, will be waived unless made within 14 days after the list is provided.

A third type of required disclosure relates to expert testimony. At an appropriate point during pretrial proceedings, a party expecting to use expert testimony must, unless excused by the court, provide other litigants with a written report from its expert. The report must be detailed and complete--in essence, a preview of the direct testimony from such person, including any exhibits to be used to summarize or support the person's opinions. After the report has been provided, the expert can be deposed, though it is expected that, given the detailed nature of the report, there will often be little need for such a deposition. Before trial, litigants must disclose any changes in such information, and the direct examination of the expert at trial will be limited to that which has been so disclosed.

The court has wide discretion to alter these disclosure requirements, or the times disclosures are to be made, as well as to change the presumptive limits on depositions and interrogatories contained in the proposed revisions of Rules 30, 31, and 33. These powers are particularly needed in view of the mandate of the Civil Justice Reform Act of 1990 that courts adopt local plans to reduce costs and delays in civil litigation. The court can exempt from the disclosure requirements those cases in which little or no discovery is typically needed (e.g., reviews of administrative records, bankruptcy appeals, government collection cases, etc.).

Under the proposed amendments to Rule 26 and the other discovery rules, scheduling conferences under Rule 16(b) will have increased importance, affording the court the opportunity to tailor the timing and limitations of discovery to the circumstances of the particular case. It is anticipated that ordinarily the initial disclosures will be made before the scheduling conference, and thus provide the court and parties with information needed to structure further pretrial proceedings and discovery. These disclosures should ordinarily

be exchanged in a preliminary meeting of the attorneys, at which time they would clarify the information provided and discuss the discovery needs in the case. For this reason, the Advisory Committee concluded that, absent another directive from the court, the initial disclosures should be due from the parties simultaneously rather than in a sequential manner.

The revision of Rule 26 provides that a person not file a motion for a protective order unless the movant "in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court order." Similar changes are proposed with respect to motions under Rule 37. Experience by many courts demonstrates that such a requirement is workable and serves to reduce unnecessary motion practice.

The provisions of Rule 26(f), relating to "discovery conferences," are deleted in view of other changes made in Rule 16 and to the discovery rules.

Fed. R. Civ. P. 29.

The revision eliminates the need for court approval of agreements to extend the time for responding to discovery requests under Rules 33, 34, and 36 if the extension would not interfere with the time set by the court for completion of discovery, for hearing a motion, or for trial.

Fed. R. Civ. P. 30.

The most significant changes in this revision involve the setting of presumptive limits on the number and length of depositions. Absent some other directive from the court, as in a scheduling order, no more than 10 depositions may be taken by the plaintiffs, no more than 10 by the defendants, no more than 10 by third-parties, and the actual examination of the deponent is to be limited to 6 hours, meaning that it could be accomplished in a single day. Experience by courts that have adopted similar rules indicates that, notwithstanding the obvious potential for dispute, the parties have usually been able to agree on which persons to depose and on how to divide the examination time. The parties are authorized--and, when really needed, expected--to agree on additional or longer depositions.

The revision adds provisions designed to deter improper conduct during depositions, such as coaching the deponent through objections and inappropriate directions not to answer.

Another change is to facilitate the procedures for taking depositions by video or audio recording by eliminating the need to obtain court approval for such depositions. A party can notice a deposition to be taken by any of the three standard methods--

stenographic, video recording, or tape recording.

The revision eliminates the principal objections that were received after publication of an earlier proposal to modify the provisions of Rule 30 relating to nonstenographic depositions. The current revision prescribes basic safeguards to assure the fairness and integrity of nonstenographic recordings. It provides that, if a deposition is noticed to be taken by a nonstenographic method, other parties can, at their own expense, have the deposition taken by the stenographic method. In addition, changes in Rules 26 and 32 require that a party using a nonstenographic deposition at a trial or on a motion must provide the court and other parties with a transcript of the portions to be played.

The revision should not operate to discourage litigants from having depositions stenographically recorded when that method will produce a more useful or less expensive record. It, moreover, contains provisions designed to alleviate the problems that sometime arise with stenographically-recorded depositions in attempting to obtain the signature of a deponent.

Fed. R. Civ. P. 31.

The revision provides that depositions upon written questions are to be counted along with those taken under Rule 30 in applying the presumptive limit of ten per side. It also reduces the time for developing additional questions from 50 days to 28 days.

Fed. R. Civ. P. 32.

The revision authorizes the use at trial of depositions of expert witnesses without having to account for their unavailability. This is particularly useful with respect to depositions of treating physicians, but is also appropriate as a cost-saving measure for other experts, who under the changes in Rules 26 and 30 will be deposed only after a detailed report has been provided to other parties.

Another change is to eliminate the risk of nonattendance at a deposition when a party that has received little advance notice of a deposition--prescribed by the revision as being less than 11 days' advance notice--is unable to obtain a court ruling on its motion for a protective order before the deposition. Under current law the party has had little option but to attend the deposition lest the court subsequently rule that the notice was reasonable and that the deposition therefore is usable at trial.

Complementing the increased opportunity to record depositions by nonstenographic means, the revision provides that, when such depositions are offered at trial or on a motion, the offering party shall provide the court with a transcript of the portions to be played. The

revision of Rule 26(a)(3) requires that a copy of the transcript also be provided to other parties in advance of trial.

Fed. R. Civ. P. 33.

The revision provides that, absent leave of court or the agreement of the parties, no more than 15 interrogatories may be served by one party upon another. Subparts are counted in determining the number of interrogatories permitted.

This number is less than prescribed in several of the local rules that many courts have already adopted to limit interrogatories. However, given the disclosures required by Rule 26(a), interrogatories will no longer be needed to obtain much of the information that has typically been sought in such discovery requests. Indeed, as with other formal discovery, interrogatories are not to be served until after the requesting party has made its initial disclosures under revised Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. The parties are authorized to extend the time to answer interrogatories when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 34.

The revision provides that documentary requests may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. These disclosures should facilitate the drafting of requests that will reduce the objections frequently raised to documentary requests. The parties are authorized to extend the time to provide access to the documents when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 36.

The revision provides that requests for admission may not be made until after the requesting party has made its initial disclosures under Rule 26(a)(1) and such disclosures have been made by, or are due from, the other party. The parties are authorized to extend the time to respond to such requests when this will not interfere with schedules ordered by the court.

Fed. R. Civ. P. 37.

The revision makes various changes to complement the provisions for disclosures contained in Rule 26(a). As a sanction for nondisclosure of required information, a party

will ordinarily be precluded from offering such evidence on a motion under Rule 56 or at trial, and the jury can be informed of such failure.

Motions for sanctions under Rule 37(a) are not to be made unless the movant in good faith conferred (or attempted to confer) with the other party in an effort to obtain the information without need for court action. In view of the abrogation of Rule 26(f) relating to discovery conferences, the sanctions provisions of Rule 37(g) are deleted.

Fed. R. Civ. P. 43.

In nonjury cases, particularly with respect to the testimony of experts or of lay witnesses concerning historical matters not in substantial dispute, it can both expedite trial and make the testimony more understandable if all or portions of the direct testimony are presented in the form of a written report prepared in advance by the witness. The revision specifically authorizes this practice, subject, however, to the right of cross-examination in the traditional manner.

Fed. R. Civ. P. 54.

The revision establishes a procedure for resolving claims for attorneys' fees, and provides a time limit within which motions for such fees must be filed. It authorizes adoption of local rules for expediting the resolution of factual disputes respecting such claims and permits courts to refer fee claims to magistrate judges and special masters without the constraints of Rule 53(b).

As suggested by the Supreme Court, it recognizes the power of courts to adopt local rules establishing rates of compensation by which the value of legal services performed in the district will ordinarily be measured. Many have urged that the standard normally applied in fee awards--reasonable hourly rates for the hours reasonably spent--be replaced by one permitting percentage fee awards. The Advisory Committee, however, doubts that such a change, even if desirable, could be effected through an amendment to the rules and accordingly leaves such questions open under the rule for further case-law development or possible statutory changes.

Fed. R. Civ. P. 56.

The revision, which takes account of various comments received when an earlier proposal was published, is intended to enhance the utility of the summary judgment procedure without changing the basic standards or most of the terms with which courts and litigants have become familiar. It eliminates ambiguities and inconsistencies in the current

language; sets a single, understandable standard for determining when summary adjudication is proper; establishes national procedures to facilitate fair consideration of Rule 56 motions; and addresses gaps in the rule that have sometimes frustrated its intended purposes.

The only basic change in terminology arises from the fact that the rule permits orders that do not resolve an entire claim. Such an order is more properly described as a "summary determination" rather than as a "summary judgment." The words "summary adjudication" are used to cover both types of orders.

The rule provides that motions for summary adjudication should not be filed until adverse parties have had a reasonable opportunity to discover any relevant evidence pertinent to the decision that is not in their possession or under their control, and it ordinarily affords such parties 30 days to respond to such motions. Motions must specifically identify the facts asserted to be without genuine dispute, and the evidentiary materials on the basis of which a party claims that a fact is or is not in genuine dispute must be specifically identified in the motion or response. The court is not required to consider materials not so identified, and is to consider materials only to the extent they would be admissible if the deponent, affiant, or person answering the interrogatory were testifying at trial. Arguments as to legal contentions or concerning the evidence are to be presented by memorandums separate from the motions and responses.

Fed. R. Civ. P. 58.

Under current law, pendency of a request for attorney's fees at the time a case is otherwise closed does not delay the appealability of the underlying judgment and, when ruled upon, can give rise to a second appeal. The revision provides another option to the district court in such circumstances. Before an appeal from the underlying judgment has been taken and become effective, the district court is permitted by the revised rule to enter an order that gives the same effect to a timely-filed motion for attorneys' fees that a timely-filed motion under Rule 59 would have--in effect, allowing the court to delay the time for appealing from the underlying judgment until it has ruled on the request for fees. This option will provide a mechanism by which review of the underlying judgment can be combined in a single appeal with any review of the fee award.

Fed. R. Civ. P. 83.

In response to the mandate of the Civil Justice Reform Act of 1990 that courts adopt local plans to reduce excessive delays and costs, this revision permits a district court--with the approval of the Judicial Conference--to adopt experimental rules inconsistent with the national rules. Such rules may not, however, be inconsistent with any statutes and must be limited in duration to a period of five years or less.

B

The revision provides that parties should not lose substantial rights because of negligent failures to comply with a requirement of form imposed by a local rule or standing order.

Fed. R. Civ. P. 84.

The revision provides that future changes in the Forms contained in the Appendix to the rules--which are illustrative and not mandatory--may be made by the Judicial Conference, without burdening the Supreme Court or Congress with such changes.

Fed. R. Evid. 702.

The revision contemplates two changes in this evidence rule that governs the admissibility of expert testimony.

The first provides that expert testimony should be limited to information that is "reasonably reliable" and that will "substantially assist" the trier of fact. These standards, together with the determination whether the witness has the necessary qualifications to provide such information, are matters to be decided by the judge under Rule 104(a). The Advisory Committee is persuaded that excessive use of expert testimony, often lacking even marginal acceptance within the scientific community, has frequently resulted in litigation costs--both in time and expense, both in pretrial proceedings and at trial--that were not justified by the ultimate benefits from such testimony. This change applies to both civil and criminal cases.

The second proposed change affects only civil cases. It complements the proposed provisions of Rules 26(a)(2) and 26(e)(1) by providing that expert information not disclosed in advance of trial as required by those provisions cannot be shown on direct examination without leave of court for good cause.

Fed. R. Evid. 705.

The revision is a technical change, clarifying that the rule is one affecting the manner of presentation of expert testimony at trial, and does not relieve a party from any obligation to disclose to the court or to other parties the facts or data upon which expert testimony is based.

C

DISCOVERY

PART II

Claire F. Carlson

C

DISCOVERY

PART II

Claire F. Carlson

I.

PURPOSE: OR HOW BEST TO PROTECT YOUR CLIENT

When you first receive a lawsuit, in most instances, your client doesn't know you and you don't know about your client. Your first concern should be to meet with your client, or a knowledgable representative, and try to learn the facts, resources, and pitfalls associated with the defense of the case. Instill your need for any facts (good or bad) or ideas that the client has, has heard of, knows or fears. Then adopt a plan of defense.

When defending a professional or corporate client, inquire about previous litigation or claims that could be important as far as the product or procedure involved in your lawsuit. Also any memorandums, interoffice communications or other materials that were prepared or bear on the suit in question.

If the referral is from an insurer, be sure to review the claim and investigative reports and statements. Look for what is lacking or needs follow-up. Talk to the investigator for any ideas or memos that might not have been furnished.

II.

PLAN YOUR DEFENSE

A. Learn About Product

(1) Study operating manuals and warnings.

(2) Whether any changes have been made in the product since the one in question was manufactured.

(3) Whether any previous claims have been made regarding the product and whether or not litigation ensued.

(4) Whether new warnings, cautions or recalls of the product have been issued and if so how information was distributed to retailers or users.

(5) The reason for the warnings, cautions or recalls.

B. Determine the Need for experts for either advice, testimony or both. Consider using an expert that has worked within the industry and is familiar with it as against a "hired gun" or professor. Use your expert to assist you:

(1) Secure information as to similar products, safety features, and procedures in the industry.

(2) Research Plaintiff's experts as to qualifications on the specific matter.

(3) Restrict Plaintiff's expert as to opinion testimony based on knowledge, qualifications of work in the field.

(4) Question your client and expert for information as to similar products, safety features, and procedures followed by other manufacturers.

III.

OTHER PERSONAL ACTION

A. If possible, view the scene of the accident and/or the vehicle, product, or other place or condition that relates to the accident or injury.

(1) Determine what exhibits would be necessary or helpful to explain the scene or condition to the jury.

(2) Obtain photographs.

(3) If helpful, prepare a video to explain the landscape, terrain, working condition, safety features, how the product works, etc.

IV.

PREPARING YOUR CLIENT AND WITNESSES
FOR PLAINTIFF'S DISCOVERY DEPOSITION

A. Importance of understanding the defense theories. Review facts, files and exhibits with your witness.

B. Importance of "thought before answer"

(1) Understand the question. If not, ask that it be explained.

(2) Don't guess. Alright to say "not sure", "have to refresh recollection", "need to refer to documents", etc.

3. Don't volunteer. Don't continue talking after answer just because there is a pause.

4. Beware of questions that are asked in a manner that already states the answer desired. Negative-pregnant leading. Give examples to your witness of this type of question and how to respond.

5. Practice question and answer.

6. At the deposition, be alert to object or point out problems with questions to your client or witness.

V.

USE OF AN EXPERT

A. An expert may be used for many different purposes other than testimony at trial.

(1) possible causes of any damage or injury other than what plaintiff is alleging.

(2) Help in gaining an understanding of how the accident occurred and any relevant circumstance that might be a cause of the damage.

(3) Past experience with a similar situation or product.

(4) Assistance in discovery of Plaintiff's expert.

B. Decide whether the expert you use for educational purposes as to the accident, product, or otherwise will be your trial expert. If the person is not going to be called to testify, under normal circumstances, the facts and opinions of this type of expert are not discoverable, unless it is a report of an examining physician (only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.) Federal Rule 26(b)(4), Iowa R.C.P. 125(b).

If, at the time the other party files Interrogatories or other requests as to your use of an expert, you must remember to supplement your answer if you decide to use the expert you have consulted as a witness. Iowa R.C.P. 125(c). In the same vein, remember Iowa R.C.P. 125(b) if the expert you have used for consultation, but not as a witness, has provided his work product to the expert that is to be used at trial and which forms part of that witness' opinion.

C

VI.

PREPARING YOUR EXPERT TRIAL WITNESS FOR DISCOVERY DEPOSITION

A. The amount of time and effort necessary for an expert to be prepared for his deposition depends upon the experience of the expert and your knowledge and previous association with the expert.

B. Prior to the discovery deposition of your expert, be sure to go through the entire file so as to make sure there are no notes or memos as to any problem areas that the expert sees in the case or memos as to his thoughts and ideas as to his role in the case. Explain that these are matters that should not be kept in the files as these are not part of his opinion. Also, it is a good idea to ask the expert to keep a separate account of his or her charges that is not kept in the file that is being prepared based upon discovery and research.

C. Explain the basic principles of law applicable to the case as well as the issues.

D. When using a "novice" expert, you should take the time to prepare him or her for what can be expected and what occurs at a deposition, just as you would your own client or other witness.

1. Explain why the deposition is being taken and what the rules for doing so are under our court system.

2. Explain what the plaintiff's attorney's purpose is in taking the deposition as far as you know it. That is, the plaintiff's attorney is trying to find out as much as possible about the subject matter.

3. Explain that the expert is not a teacher but is there to answer questions and, therefore, the expert should listen to the question, answer it to the best of his or her ability and wait for another question to continue.

4. In the same vein, the expert does not need to state any opinions he has formed in the past that are not based on his work on the present file. However, if the question is so broad as to possibly include these, he should answer or state that the question is so broad, he is not sure that he has answered everything he might know or be able to explain without more pertinent questions.

C

VII.

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege applies to protect both verbal and written communications between attorney and client. To establish the existence of the privilege, all of the following elements are required: (1) a communication; (2) made in confidence; (3) to an attorney; (4) by a client; (5) for the purpose of seeking or obtaining legal advice. Should any of these five elements be absent, the privilege may not be claimed.

Even if the privilege exists, it is subject to waiver by disclosure of any part of the communication to a third party, production of privileged documents or deposition testimony, or by use of legal advice for business purposes.

A. Concerns as to how to protect this privilege usually arise in the partnership or corporate setting. That is because attorneys must determine who is the client from among the various personnel of the company before giving advice that they wish protected. The Courts have adopted the "control group" test for determining whether a communication of a corporate employee or agent can qualify as a communication of the corporate client, as those employees that are in a position to control or take a substantial part in the determination of corporate or company action in response to legal advice. City of Philadelphia v. Westinghouse Electric, 210 F. Supp. 483 (E.D. Pa. 1962); Consolidated Coal v. Bucyrus-Eire Co., 432 N.E. 2d 250 (Ill. 1982).

However, the Supreme Court, in Upjohn Co. v. United States, 449 U.S. 383 (1981), rejected the control group test as a blanket rule in favor of a case-by-case approach. The Court reasoned that the control group test overlooks "the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

B. Shared counsel or between counsel with a common interest comes under the cloak of privilege. Where two or more parties share the same attorney, their communication to the attorney remains confidential and privileged as against all parties. Where more than two or more parties are involved with a common interest, the sharing of confidential information between their lawyers does not revoke the privilege.

VIII.

WORK PRODUCT DOCTRINE

An attorney's work product is generally not discoverable. However, discovery of documents and tangible things otherwise discoverable under the rules may be obtained by the opposing party upon a showing of substantial need in the preparation of the case and inability to obtain the substantial equivalent of the information without substantial hardship. In ordering the production, the Court shall protect against disclosure of mental impressions, conclusions, opinions or other legal theories of an attorney or other representative of the party concerning the litigation. Federal Rule 26(b)(3), Iowa R.C.P. 122(c).

Note the proposed amendment to Federal Rule 26(b) adding:

> "(5) Claims of Privilege or Protection of Trial Preparation Materials. When information is withheld from discovery on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."

A. Prepared in Anticipation of Litigation

The Iowa Court, in Ashmead v. Harris, 336 N.W. 2d 197 (Iowa 1983), determined that all routine investigations of automobile accidents by insurers are "in anticipation of litigation." It is sufficient showing to restrict such discovery if the primary motivating purpose was to aid in possible future litigation.

B. The work product rule can also be applied to experts retained by or at direction of the attorney to investigate and produce reports on the technical aspects of specific litigation. State ex rel Corbin v. Ybarra, 777 P. 2d 686 (AZ 1989).

C. Corporate in-house counsel's knowledge, reports or memos also come under the attorney work product or anticipation of litigation rule. Shelton v. American Motors Corp., 805 F. 2d 1323 (8th Cir. 1986).

D. Dangers Under Federal Rules of Evidence Rule 612

Where the attorney shares work product information such as investigations, possible witness testimony, interview statements or other work product, these matters may lose the protective status.

Particularly when working with an expert in preparation for the expert's discovery deposition, do not use information or reveal documents that otherwise would be protected, unless you no longer wish to maintain the privilege.

IX.

PROTECTIVE ORDERS UNDER FEDERAL RULE 26(c), I.R.C.P. 123

Both the federal and state rules make provision for protective orders, upon proper motions showing good cause, to protect a person or party from annoyance, embarrassment, oppression or undue burden or expense. The order may bar or limit the discovery. In some instances, the Court will hold an "in camera" inspection to determine what should be protected. In re: Gillespie, 348 N.W. 2d 233 (Iowa 1984).

A. Limiting Discovery

A protective order may be sought to protect against disclosure of trade secrets, confidential research, development or commercial information. The order may limit the inquiry by the opposing attorney or limit the disclosure of such information, even after trial. Tratchel v. Essex Group, Inc., 452 N.W. 2d 171 (Iowa 1990); Iowa Beef v. Bagley, 8th Cir., 601 F. 2d 949, cert. den. 99 S. Ct. 1977, 441 U.S. 907, 60 L. Ed. 376. It may also be used to protect against burdensome discovery. However, this alone is not sufficient to bar discovery, but may be used to restrict it. Berg v. Des Moines General Hosp., 456 N.W. 2d 173 (Iowa 1990).

B. Supporting the Motion

Your motion must be supported by sufficient evidence as to what you desire protected and your reasons, so as to enable adverse counsel to contest the motion. The burden then shifts to the resisting party to show why the order should not be granted. In ruling, the Court may use "in camera" inspection to determine what to protect and in what way to so order. In re Gillespie, 348 N.W. 2d 233 (Iowa 1984).

C. Challenges to the federal and state protective orders are increasing from the plaintiff's bar. See the excellent article in For the Defense, March 1991, "Protective Orders: The New Challenge" by Paula D. Osborn.

C

DISCOVERY - PARTS I & II

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Discovery at Trial, H. Richard Smith, Bridge-the-Gap Seminar 1990, page E-1

Trial Notebook, 2d edition, Iowa Academy of Trial Lawyers

Federal Practice and Procedure, Vol. 8, Wright & Miller

Bender Forms of Discovery, Vol. 11

Pattern Deposition Checklist, 2d edition, Danner

DRI, Defense Practice Notebook

1987 Bridge-the-Gap Trial Notebook, Mark Humphrey, page H-1

FDIC Quarterly, Fall 1990, The Attorney-Client Privilege and The Work Product Doctrine in the Corporate Setting, Merton E. Marks

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Defense Update: Defense of Catastrophic Damages, April 1991, Vol. IV, 1st of 3 parts, Michael W. Ellwanger and Joseph L. Fitzgibbons

OTHER RESOURCES

DRI Litigation Support Services, Expert Witness Index, Brief Bank, Individual Research Service, 750 N. Lake Shore Drive, Suite 500, Chicago, IL 60611; telephone 312-944-0575

IDCA Case Bank, 520 35th Street, Des Moines, IA 50312; telephone 515-274-5918

THE FAILURE TO LET THE PLAINTIFF DISCOVER

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LEGAL AND ETHICAL CONSEQUENCES:

I. Statutory Considerations

A. 28 U.S.C. §1927. Counselor's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

(June 25, 1948, ch 646, §1, 62 Stat. 957; September 12, 1980, P.L. 96-349, §3, 94 Stat. 1156.)

B. §§602.10112, 602.10113, 602,10121, 602.10122

§602.10112 Duties of attorneys and counselors.

It is the duty of an attorney and counselor:

1. To maintain the respect due to the courts of justice and judicial officers.

2. To counsel or maintain no other actions, proceedings, or defenses than those which appear to the attorney or counselor legal and just, except the defense of a person charged with a public offense.

3. To employ, for the purpose of maintaining the causes confided to the attorney or counselor, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law.

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which the attorney or counselor is charged.

6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest.

§602.10113 Deceit or collusion.

An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action.

§602.10121 Revocation of license.

The supreme court may revoke or suspend the license of an attorney to practice law in this state.

§602.10122 Grounds of revocation.

The following are sufficient causes for revocation or suspension:

1. When the attorney has been convicted of a felony. The record of conviction is conclusive evidence.

2. When the attorney is guilty of a willful disobedience or violation of the order of the court, requiring the attorney to do or forbear an act connected with or in the course of the attorney's profession.

3. A willful violation of any of the duties of an attorney or counselor as hereinbefore prescribed.

4. Doing any other act to which such a consequence is by law attached.

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II. Civil Rules Relative to Sanctions

A. Federal Rules of Civil Procedure

1. Rule 11 Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the

filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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2. Rule 26(g)

Rule 26. General Provisions Governing Discovery

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party

making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

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If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

3. **Rule 37(b)(2)(E) and (d)**

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

Rule 37(b) Failure to Comply with Order

Rule 37(b)(2) Sanctions by Court in Which Action is Pending.

Rule 37(b)(2)(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (c) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award to

expenses unjust.

Rule 37(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act as applied for a protective corder as provided by Rule 26(c).

B. Iowa Rules of Civil Procedure

1. Rule 80

RULE 80. VERIFICATION ABOLISHED; AFFIDAVITS

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(a) Pleadings need not be verified unless special statues so require and, where a pleading is verified, it is not necessary that subsequent pleadings be verified unless special statues so require. Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: Counsel has read the motion, pleading, or other paper; that to the best of Counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party

who is not represented by Counsel shall impose a similar obligation on such party.

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(b) If a party commencing an action has in the preceding five-year period unsuccessfully prosecuted three or more actions, the court may, if it deems the actions to have been frivolous, stay the proceedings until that party furnishes an undertaking secured by case or approved sureties to pay all costs resulting to opposing parties to the action including a reasonable attorney fee.

(c) Any motion asserting facts as a basis of the order it seeks, and any pleading seeking interlocutory relief, shall contain an affidavit of the person or persons knowing the facts requisite to such relief. A similar affidavit shall be appended to all petitions which special statutes require to be verified.

2. Rule 134. **FAILURE TO MAKE DISCOVERY; CONSEQUENCES**

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

Rule 134(a)(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees,

unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

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If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Rule 34(b) Failure to Comply with Order.

Rule 34(b)(2)(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of

expenses unjust.

Rule 34(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under R.C.P. 127, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

(1) The request was held objectionable pursuant to R.C.P. 127, or

(2) The admission sought was of no substantial importance, or

(3) The party failing to admit had reasonable ground to believe that he might prevail on the matter, or

(4) There was other good reason for the failure to admit.

Rule 134(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.

Rule 134(d)(3) To serve a written response to a request for inspection submitted under R.C.P. 129, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among other it may take any action authorized under paragraphs "A", "B", and "C" of subdivision "b"(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including

attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by R.C.P. 123.

C. Disciplinary Rule 7-109. CONTACT WITH WITNESSES

DR 7-109(A) A lawyer shall not suppress any evidence that he or his client has legal obligation to reveal or produce.

III. Winning the Battle and Winning the War.

A. Iowa Case Law.

Hense vs. G.D. Searle & Co.
452 N.W.2d 440 (Iowa 1990)

Sanction: $54,706.95

Berg vs. Des Moines General Hosp. Co.
456 N.W.2d 173 (Iowa 1990)

Sanction: Remand to District Court to Determine if Prejudice Sufficient to Grant New Trial.

Farley v. Ginther
450 N.W.2d 853 (Iowa 1990)

Sanction: Dismissal

B. Federal Court Cases.

Cootertzell vs. Hartmarx Corp.
110 S.Ct. 2447, 110 L.Ed. 359 (1990)

Chambers vs. NASCO, Inc.
111 S.Ct. 2123 (1991)

Sanction: $1,000,000 attorneys' fees

Gargin vs. Morrell
133 FRD 504 (E.D. Mich. 1991)

Sanction: $200

C. Rule 11 Review.

IV. Conclusion.

Litigate at Your Own Risk.

APPENDIX A

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ISBA Mediation Procedure.

While professionalism cannot be defined with precision, the following percepts should guide a lawyer's conduct:

1. In litigation or contentious situations, lawyers should strive to maintain their objectivity in representing the interest of the client and their relationship with the Court and opposing Counsel.

2. In fulfilling the lawyer's primary duty to the client, a lawyer must be ever conscious of the broader duty to the legal system. In all matters, a lawyer's word is the lawyer's bond.

3. Lawyers should treat each other, their clients, the opposing parties, the Courts and members of the public with courtesy and civility, and conduct themselves in a professional manner at all times.

4. Lawyers, as officers of the Court, are an integral part of the justice system. They are entitled to be treated with respect by the Court and carate personnel, and shall treat fellow lawyers, the Court and its personnel with equal respect.

5. In adversary proceedings clients are litigants, and though ill feelings may exist between clients, such ill feelings should not influence a lawyer's conduct, attitude or demeanor towards opposing Counsel.

6. Effective advocacy does not require antagonistic or obnoxious behavior. Lawyers should adhere to the higher standard of conduct which judges, fellows attorneys, clients and the public may rightfully expect.

7. The lawyer, absent exceptional circumstances, has the discretion to determine the accommodations to be granted opposing Counsel in all matters not directly affecting the merits of the cause or prejudicing the client's right, such as extensions of time, continuances, and adjournments.

8. In litigation, the lawyer should not employ procedures which are only intended to cause delay, annoyance or insult to opposing Counsel, the parties or witnesses.

9. The lawyer has a duty to students and new members of the Bar regarding professionalism and the customs of the profession.

10. Recognizing a lawyer's commitment to family and the profession, except where necessary to protect the rights of the client, no hearing, trial or deposition shall be set ex parte during the week of the Annual Meeting of the Iowa State Bar Association, and in the month of August.

To implement the code and relieve the frustration felt by those who perceive themselves to be victims of another's unprofessional conduct which does not rise to the level of sanctionable conduct or violation of the Code of Professional Responsibility, the Board adopted mediation as a method to resolve disputes concerning the professionalism issues. Under the medication plan, any lawyer or judge wishing to resolve a dispute wherein it is

claimed that another lawyer has violated the professionalism code can notify the Professionalism committee of the complaint. The Committee will assign one of its members to act as a mediator to meet with the parties and attempt to adjust the dispute. All matters will be kept strictly confidential. The resolution reads:

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1. **Changing Resolution:** The Board of Governors of the Iowa State Bar Association hereby authorizes the Professionalism Committee to establish a voluntary mediation procedure to implement the Code of Professionalism of the Iowa State Bar Association by mediating any disputes that may exist among members of the Bench and Bar when it is alleged that the Code has been breached.

2. **Confidentiality:** Mediation and action taken by the Professionalism Committee shall be confidential. The Professionalism Committee shall keep no records or conduct any of its mediation by correspondence. At the conclusion of the mediation, the initial written complaint shall be destroyed. The Professionalism Committee may report to the Board of Governors and the Bar the general nature of the complaints received and the resolve reached provided that all identifying characteristics have been omitted.

3. **Voluntary Procedure:** Professional dispute mediation shall be voluntary and shall only occur if all parties consent.

4. **Presumption:** The Professionalism Committee shall only act upon complaints issued in writing by members of the Bench and Bar. It shall be conclusively presumed that the complaining party has either discharged his or her duty to report violations of the Iowa Code of Professional Responsibility to the Committee on Professional Ethics and Conduct of the Iowa State Bar Association or that the conduct complained of does not amount to such a violation. As such the Professionalism Committee shall be entitled to rely on the said presumption and not be obligated to report the questioned conduct to the Ethics committee.

Upon approval by the Board of Governors, the following implementing resolution shall be operative:

5. **Mediation Sub-Committee:** The Chairman of the Professionalism Committee shall appoint three of its members to constitute a Mediation sub-committee to act as mediators with regard to any dispute between Bench and Bar wherein it is claimed that the Professional Code has been breached.

6. **Mediation Procedure:** Upon being advised in writing by a member of the Bench or Bar that a breach of the Code of Professionalism has occurred, the Mediation Committee shall assign one of its members to contact the parties involved and begin mediation to resolve the professional dispute.

PRETRIAL MOTION PRACTICE

BY
KENNETH L. KEITH
OTTUMWA, IOWA

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PRETRIAL MOTION PRACTICE

BY
KENNETH L. KEITH
OTTUMWA, IOWA

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By definition this presentation deals only with those motions prior to trial. It therefore excludes motions made during trial, such as motions for mistrial, motions at the conclusion of the plaintiff's evidence or all the evidence, such as motions for directed verdict, and also includes post-trial motions such as those contemplated by RCP 243 and 244 involving jury trials, and 179 following a trial to the court. It also excludes motions involved in the appellate practice which would be covered by the Rules of Appellate Procedure. The statutory proceeding for an offer to confess judgment, Chapter 677 ICA, is also not dealt with.

The matters to be considered herein will be divided into the following categories:

I. General provisions re motions

II. Motions re pleadings

III. Motions re discovery

IV. Special action motions

(All references to IRCP, RCP, Rules, or Rules of Procedure, shall be to the current Iowa Rules of Civil Procedure unless indicated otherwise.)

I. GENERAL PROVISIONS RE MOTIONS

Motions are different than pleadings, and should not be confused therewith. Motions had a more important function under the earlier practice in Iowa than they do at the present time. For an enlightening discussion see Dwight G. McCarty, "Attacking a Defective Pleading", 20 Iowa Law Review 49 (November 1934); and McCarty Iowa Pleading, Vol. 1, Sections 212-252A, 1934 and Supplements thereto. In his articles Mr. McCarty gives the history, as well as a detailed analysis of the use and purpose of motions generally and certain motions in particular. Even under our present practice his well written treatise is still practical and useful.

WHAT IS A MOTION - DEFINITION

A motion is defined in RCP 109 as follows:

> "A motion is an application made by any party or interested person for an order. It may contain several objects which grow out of, or are connected with, the action. It is not a 'pleading'."

Rule 69(b) states in part,

> "'Pleadings' as used in these rules do not include motions."

Rule 117(d) provides,

> "A 'motion' within this rule is any paper denominated as such, or any other matter requiring attention or order of court before the trial of the issues on their merits."

PROOF OF FACTS IN MOTION

Rule 116 provides,

"Evidence to sustain or resist a motion may be by affidavit or in any other form to which the parties agree or the court directs. The court may require any affiant to appear for cross-examination."

Rule 80(c) also provides,

"Any motion asserting facts as the basis of the order it seeks, and any pleading seeking interlocutory relief, shall contain an affidavit of the person or persons knowing the facts requisite to such relief. A similar affidavit shall be appended to all petitions which special statutes require to be verified."

TIME OF HEARING ON MOTIONS

Rule 114 provides,

"A party who has been served with original notice or has appeared, shall take notice of the regular motion day on which motions will be heard."

MOTION DAYS

117. Motion days—disposition of motions.

a. The chief judge of each judicial district shall provide by order for at least one motion day to be held each month in each county, when all motions made prior to trial on issues of fact on file ten days or more shall be deemed submitted unless by other rule, statute or order of court entered for good cause shown another time for submission is fixed. Such motions not orally or telephonically argued for any reason shall be deemed submitted without argument unless they are then or have previously been, set down for argument at some time somewhere in the judicial district not more than ten days thereafter, when they must be submitted without further postponement. Each motion filed shall set out the specific points upon which it is based. A concise memorandum brief may be appended if it is desired to cite supporting rules, statutes or other authorities.

b. The court may hear and rule on any motion prior to motion day so as not to delay completing the issues or trial of the case.

c. The trial court shall rule on all motions within thirty days after their submission, unless it extends the time for reasons stated of record.

d. A "motion" within this rule is any paper denominated as such, or any other matter requiring attention or order of court before the trial of the issues on their merits.

e. The clerk of each court shall maintain a motion calendar on which every "motion" within the purview of "*d*", above, shall be entered. It shall be arranged to show (1) docket page and cause number of action in which filed, (2) abbreviated title of the case with surname of the first-named party on each side, (3) counsel of record for parties, (4) denomination of the "motion," (5) date filed, (6) party by whom filed, (7) date entered on calendar, and (8) date of disposition by ruling, order or otherwise. Separate motion calendars for law, equity or other divisions may be maintained.

f. The court may arrange for the submission of motions under these rules by telephone conference call unless oral testimony may be offered. [Report 1943; amendment 1945; amendment 1961; amendment 1967; amendment 1969; amendment 1975; amendment 1983, Report February [illegible]

DISCRETIONARY NOTICE OF HEARING ON MOTIONS

"115. Discretionary notice. The court may require counsel to be apprised, in any manner it directs, of the time and place at which it will hear or act on any motion, application or other matter other than at the regular motion day or pursuant to general assignment. This rule shall be applied to expedite, not to delay, hearings and submissions."

RULING ON MOTIONS

Rule 118 provides,

"A motion, or other matter involving separate grounds or parts, shall be disposed of by separate ruling on each and not sustained generally."

II. MOTIONS RE PLEADINGS

FAILURE TO MOVE - EFFECT OF OVERRULING MOTIONS

Rule 110 provides,

"No pleading shall be held sufficient for failure to move to strike or dismiss it. If such motion is filed and overruled, error in such ruling is not waived by pleading over or proceeding further; and the moving party may always question the sufficiency of the pleading during subsequent proceedings."

TIME TO MOVE

Rule 85 (a) (c) (e) and (f) provide,

"a. Motions. Motions attacking a pleading must be served before responding to a pleading or, if no responsive pleading is required by these rules, upon motion made by a party within twenty days after the service of the pleading on such party."

"c. Time after filing motions. The service of a motion permitted under these rules alters these periods of time as follows, unless a different time is fixed by order of the court.

If the motion is so disposed of as to require further pleading, such pleading shall be served within ten days after notice of the court's action."

"e. The court may order any motion or pleading to be filed within a shorter time than specified above."

"f. Extending time. For good cause, but not ex parte, the court may extend the time to answer or reply for not more than thirty days beyond the times above specified. For good cause but not ex parte, and upon such terms as the court prescribes, the court may grant a party the right to file a motion, answer or reply where the time to file same has expired."

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PRE-ANSWER MOTIONS

104(a) provides,

"If a motion under RCP 111'a' is filed before a responsive pleading, the defenses of want of jurisdiction over the person, or insufficiency of the original notice or its service, must be raised in the motion or are waived. Want of jurisdiction of the subject matter may be raised by pre-answer motion; but the court shall dismiss the action at any time it finds, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter."

This motion takes the place of the old "Special Appearance" which is no longer recognized in Iowa.

FAILURE TO STATE A CLAIM (ATTACKING THE PETITION)

This motion is authorized by 104(b).

"Failure to state a claim on which any relief can be granted, may be raised by motion to dismiss such claim, filed before answer."

SUFFICIENCY OF ANY DEFENSE (ATTACKING THE ANSWER)

This motion is authorized by 104(c).

"Sufficiency of any defense may be raised by motion to strike it, filed before pleading to it."

INSUFFICIENCY OF PLEADING SPECIFIED (ALL 104 MOTIONS)

"Such motions must specify wherein the pleading they attack is claimed to be insufficient." (IRCP 104(d))

MOTION FOR CHANGE OF VENUE

This motion is authorized by RCP 175 and must be filed before answer.

"175. Action brought in wrong county.

a. An action brought in the wrong county may be prosecuted there until termination, unless a defendant, before answer, moves for its change to the proper county. Thereupon the court shall order the change at plaintiff's costs, which may include reasonable compensation for defendant's trouble and expense, including attorney's fees, in attending in the wrong county.

b. If all such costs are not paid within a time to be fixed by the court, or the papers are not filed in the proper court within twenty days after such order, the action shall be dismissed."

PRE-ANSWER MOTIONS MUST BE COMBINED

"111. Motions combined; waiver regarding jurisdiction and venue.

a. Motions challenging personal jurisdiction under RCP 104'a', motions to recast or strike, for a more specific statement, and to dismiss for failure to state a claim upon which any relief may be granted, shall be contained in a single motion and only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter.

b. At the same time that a party makes a motion as described in subdivision 'a' of this rule, the party, if the grounds therefor exist, shall move to dismiss under RCP 104'a' or for a change of venue to th proper county under RCP 175. Failure to do so shall constitute a waiver of the defenses of lack of personal jurisdiction and improper venue."

MOTION TO CORRECT OR RECAST PLEADINGS

"81. Correcting or recasting pleadings. On its own motion or that of any party, the court may order any prolix, confused or multiple pleading, to be recast in a concise single document within such time as the order may fix. In like manner, it may order any pleading not complying with these rules to be corrected on such terms as it may impose."

MOTION FOR MORE SPECIFIC STATEMENT

"112. Motion for more specific statement. A party may move for a more specific statement of any matter not

pleaded with sufficient definiteness to enable him to plead to it and for no other purpose. It shall point out the insufficiency claimed and particulars desired."

A very instructive analysis of motion for more specific statement and some dangers involved is contained in the opinion of Wunschel v. Hoefer, 241 N.W. 2d 893, by Justice McCormick. The full text of the opinion is included herein.

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MOTION TO STRIKE

"113. Striking improper matter. Improper or unnecessary matter in a pleading may be stricken out on motion of the adverse party."

The petition should properly state matters necessary to state a cause of action and matters stated which have no relevancy whatever to a proper presentation of the cause of action should be stricken out.

Bookin v. Iowa Southern Utilities Company, 221 Iowa 1336, 268 N.W. 50 (1936).

Where the Plaintiff makes a conclusion in his petition which is unsupported by allegations of fact, a motion to strike is properly sustainable.

Hutchinson v. Des Moines Housing Corporation, 248 Iowa 1121, 84 N.W. 2d 10 (1957).

Repetitious pleadings are properly stricken on motion to strike.

Flood v. City National Bank of Clinton, 220 Iowa 935, 263 N.W. 321 (1935).

MOTION TO DISMISS

There is no separate motion so designated, but it is authorized in RCP 111(a).

> "Motions...and to dismiss for failure to state a claim upon which any relief may be granted..."

and by Rule 104(b)

> "b. Failure to state a claim on which any relief can be granted, may be raised by motion to dismiss such claim, filed before answer."

When a doubtful pleading is attacked by motion to dismiss before issue is joined or answer, doubt will be resolved against the pleader.

Furey v. Crawford County, 208 N.W. 2d 15 (Iowa 1973).

Failure to state a claim on which any relief can be granted may be raised by motion to dismiss.

INTERVENTION - NECESSITY OF MOTION?

Intervention is authorized by Rules 75 and 76.

> "75. Interventions. Any person interested in the subject matter of the litigation, or the success of either party to the action, or against both parties, may intervene at any time before trial begins, by joining with plaintiff or defendant or claiming adversely to both."

> "76. Manner. Every intervenor shall file a petition, and a separate copy for each party against whom he asserts a right. The clerk shall transmit such copy to the attorney for the adversary party, who shall, without further notice, move or plead thereto within seven days from the date of filing unless the court fixes a shorter time and notice thereof is given."

No motion to intervene is required by either Rule 75 or 76. These rules are basically a continuation of prior statutory

provisions regarding intervention. Several cases touch on the practice relative to the necessity of leave of court or motion. Under the prior statute a motion seeking leave of court to file a petition of intervention was unnecessary although it was a usual and ordinary procedure. Massachusetts Bonding and Insurance Co. v. Novotny, (1925) 200 Iowa 227, 202 N.W. 588.

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On motion to dismiss a petition for intervention, the factual allegations in the motion should be ignored. Rick v. Bogel, (Iowa 1973) 205 N.W. 2d 713.

Overruling a motion to strike a petition of intervention is tantamount to granting leave to file it. Ringen Stove Co. v. Bowers, (1899) 109 Iowa 175, 80 N.W. 318.

On a motion to dismiss the court is not concerned with the merits of the case, but only with the question of whether the pleading sustains a cause of action upon which relief can be granted.

> Bervid v. Iowa State Tax Commission, 247 Iowa, 1333, 78 N.W. 2d 812 (1956).

In this respect the court does not have discretion whether to sustain or deny a motion to dismiss, but must base its ruling on purely legal grounds.

> Newton v. City of Grundy Center, 246 Iowa 916, 70 N.W. 2d 162 (1955).

The purpose of a motion to dismiss for failure to state a claim is to expedite a hearing on the merits of an action and not to outfit a party with tactical armaments for delay and

harassment of his adversary. FRA S. P. A. v. SURG-O-FLEX of America, Inc., 415 F. Supp. 421, 424 (USDC SD New York 1976).

Overruling or sustaining a motion to dismiss does not depend on the trial court's discretion. The court must grant or deny the motion according to law. Logan v. McMillen, 244 Iowa 1328, 60 N.W. 2d 498, 502 (1953). A motion to dismiss is limited to the failure to state any claim on which any relief can be granted. Such a motion is now almost as unnecessary as the similar obsolete pleading of demurrer. Burd v. Board of Education of Audubon County, 260 Iowa 846, 151 N.W. 2d 457, 463 (1967).

A motion to dismiss grounded on failure to state a cause of action is sustainable only when it appears to a certainty that the pleader has failed to state a claim upon which any relief may be granted under any state of facts which could be proved in support of the claim asserted. Like the old demurrer, a motion to dismiss admits the well-pleaded facts in the pleading assailed for the purpose of testing their legal sufficiency. Berger v. General United Group, Inc., 268 N.W. 2d 630 (Iowa 1978). Even the most extravagant factual averment is dignified into a verity when exposed to a motion to dismiss. Bailey v. Iowa Beef Processors, Inc., 213 N.W. 2d 642, 647 (Iowa 1973).

The motion may not sustain itself by its own allegations of fact not appearing in the challenged pleading. Such averments are no proper part of the motion and must be ignored. The motion

to dismiss can neither rely on facts not alleged in the petition, except those of which judicial notice may be taken, nor may they be decided by an evidentiary hearing. Berger, op cit., p. 634.

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Caution re use of motions to dismiss

In a very recent case our Supreme Court analyzed motions to dismiss and cautioned lawyers and judges regarding the dangers of using and sustaining such a motion to dismiss. See Cutler, Executor v. Kloss, et al, Case #266/90-823 filed July 17 1991 as follows, at pages 6 and 7:

> I. Before addressing these claims in the divisions which follow, we mention the special risks and problems which attend premature attacks on litigation by motions to dismiss. Although we conclude the trial court should be affirmed, we certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas.
>
> The reasons are clear enough. In the first place, in filing a motion to dismiss, a defendant gives away all the facts because in ruling on the motion well-pled facts are assumed to be true. Berger v. General United Group, 268 N.W.2d 630, 634 (Iowa 1978); Sarvold v. Dodson, 237 N.W.2d 447, 447-48 (Iowa 1976). Combined with this venerable rule

is a more recent one. Under notice pleading a suit will survive a motion to dismiss whenever a valid recovery can be gleaned from the pleadings. Lakota Consol. Indep. School v. Buffalo Center/Rake Community Schools, 334 N.W.2d 704, 708 (Iowa 1983).

We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal. We emphasize that our determination of this appeal is no commendation for filing or sustaining the motion to dismiss.

MOTIONS RE PARTIES - SUBSTITUTION - TRANSFER

IRCP 15 through 21 deal with the matter of substitution of parties under various contingencies, such as death, transfer of interest, incapacity, etc., and motions are the appropriate method of bringing these matters to the court's attention for an appropriate order of substitution.

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MOTIONS RE JOINDER OR MISJOINDER

IRCP 22 through 28 deal with the issues and problems of joinder, misjoinder, and nonjoinder. A motion is the proper vehicle to bring these matters to the court's attention for appropriate action. RCP 27 deals with the remedy for misjoinder and discusses appropriate motions therefor.

> "27. Remedy for misjoinder.
>
> a. Parties. Misjoinder of parties is no ground for dismissal of the action, but parties may be dropped by order of the court on its own motion or that of any party at any stage of the action, on such terms as are just, or any claim against a party improperly joined may be severed and proceeded with separately.
>
> b. Actions. The only remedy for improper joinder of actions shall be by motion. On such motion the court shall either order the causes docketed separately or strike those causes which should be stricken, always retaining at least one cause docketed in the original case. Before ruling on such motion, the party whose pleading is attacked may withdraw any of the causes claimed to be misjoined."

MOTIONS RE THIRD PARTY PRACTICE

RCP 34 covers third party practice in Iowa. While it doesn't deal specifically with motions, it is believed a motion is the proper vehicle to bring these matters to the court's

attention for appropriate action in certain circumstances.

MOTIONS RE INTERPLEADER

RCP 35 through 41 deal with interpleader. Motions may be appropriate in various circumstances to raise matters pertaining thereto.

MOTIONS RE CLASS ACTION

RCP 42.1 through 44 deal with class actions. It is believed that motions are the proper vehicle to present various questions and requests for relief on issues under this area of pleading and procedure.

MOTION FOR CONSOLIDATION (PLEADING)

> "185. Consolidation. Unless some party shows he will be prejudiced thereby the court may consolidate separate actions which involve common questions of law or fact or order a single trial of any or all issues therein. In such cases it may make such orders concerning th proceedings as tend to avoid unnecessary cost or delay."

While this rule is often thought of as a rule for trial, it is often used at the pleading stage to allow pleadings and/or discovery, or both, to be combined in appropriate cases. This may result in a substantial saving of time and effort for all parties.

III. MOTIONS RE DISCOVERY

MOTIONS RELATING TO DISCOVERY

Prerequisite to filing discovery motions.

> "122(e) Motions relating to discovery. No motion relating to depositions or discovery shall be filed by the clerk or considered by the court unless the motion

alleges that counsel for the moving party has made a good faith but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court. If said motion relates to an interrogatory, a request for admission, or a request for production, the disputed interrogatory or request with the answer or response, if any, shall be attached to the motion."

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MOTION FOR PROTECTIVE ORDER

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123. **Protective orders.** Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

a. That the discovery not be had;

b. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

c. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

d. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

e. That discovery be conducted with no one present except persons designated by the court;

f. That a deposition after being sealed be opened only by order of the court;

g. That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

h. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of R.C.P. 134"*a*"(4) apply to the award of expenses incurred in relation to the motion. [Report 1943; amendment 1965; amendment 1970; amendment 1973]

Referred to in R.C.P. 121, 134"*a*, *d*"; 148; Ct.R. 118.6

MOTION RE TIMING OF DISCOVERY

"124. Sequence and timing of discovery. Unless the court upon motion orders otherwise for the convenience of parties and witnesses and in the interests of justice, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

124.2. Discovery conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

a. A statement of the issues as they then appear;

b. A proposed plan and schedule of discovery;

c. Any limitations proposed to be placed on discovery;

d. Any other proposed orders with respect to discovery;

e. A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and that party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by R.C.P. 136. [Report May 28, 1987, effective August 3, 1987]

Referred to in 125.2 of R.119.6

MOTION RE SEQUENCE OF EXPERT WITNESS DISCLOSURE

"125 e. Court's discretion to compel disclosure of experts. The court has discretion to compel a party to make the determination and disclosure of whether an expert is expected to be called as a witness and shall do so to ensure that determination and the disclosures required by this rule within a reasonable and specific time before the date of trial. Upon motion, or at a discovery conference held pursuant to RCP 124.2, or on its own initiative, the court may prescribe the sequence in which the parties make the determination and disclosures provided for under this rule."

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134. Failure to make discovery—consequences.

a. Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under R.C.P. 140 or 150, or a corporation or other entity fails to make a designation under R.C.P. 147"e" or a party fails to answer an interrogatory submitted under R.C.P. 126, or if a party, in response to a request for inspection submitted under R.C.P. 129, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

In ruling on such motion, the court may make such protective order as it would have been empowered to make on a motion pursuant to R.C.P. 123.

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

MOTION TO TERMINATE OR LIMIT DEPOSITION

"148 b. Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in RCP 123. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of RCP 134'a'(4) apply to the award of expenses incurred in relation to the motion."

See IRCP 123, protective orders which by its terms applies to depositions.

MOTION TO RECORD DEPOSITION BY OTHER THAN STENOGRAPHIC MEANS

"104 (b) B (4)

The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at that party's own expense. Leave of court is not required to record testimony by nonstenographic means if the deposition is also to be recorded stenographically."

IV. SPECIAL MOTIONS

MOTION TO CONSOLIDATE (FOR TRIAL)

"185. Consolidation. Unless some party shows he will be prejudiced thereby the court may consolidate separate actions which involve common questions of law or fact or order a single trial of any or all issues therein. In such cases it may make such orders concerning the proceedings as tend to avoid unnecessary cost or delay."

MOTION FOR SEPARATE TRIALS

"186. Separate trials. In any action the court may, for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, or of any separate issue of fact, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately."

MOTION FOR CONTINUANCE

"183. Causes for continuance.

a. A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves.

b. All such motions based on absence of evidence must be supported by affidavit of the party, his agent or attorney, and must show: (1) The name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them; (2) what efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by a certain specified date; (3) what particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and knows of no other witness by whom they can be fully proved. If the court finds such motion sufficient, the adverse party may avoid the continuance by admitting that the witness if present, would testify to the facts therein stated, as the evidence of such witness."

(D) Summary judgments

237. On what claims. Summary judgment may be had under the following conditions and circumstances:

a. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the appearance day or after the filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

b. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

c. Motion and proceedings thereon. The motion shall be filed at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may file opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. If summary judgment is rendered on the entire case, R.C.P. 179"b" shall apply.

d. Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

e. Form of affidavits—further testimony—defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, further affidavits, or oral testimony. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

f. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

g. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

h. Supporting statement and memorandum. Upon any motion for summary judgment pursuant to this rule, there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried, including specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file and affidavits which support such contentions and a memorandum of authorities. [Report 1943; amendment 1967; amendment 1975; amendment 1980]

Referred to in R.C.P. 238, 240

238. Procedure. Motions and affidavits relating to any claim under R.C.P. 237 shall be filed and copies delivered as provided in R.C.P. 82 and hearing shall be had thereon as provided in R.C.P. 117. [Report 1943; amendment 1967]

Time computed §4 1(22)

MOTION FOR JUDGMENT - SPECIAL RELATIONSHIP

239. On motion in other cases.

a. Judgments may be obtained on motion by sureties against principals or cosureties for money due because paid by them as such; by clients against attorneys, by plaintiffs in execution against sheriffs, constables or other officers for money or property collected by them; and in all other cases specially authorized by statute.

b. A judgment for contribution based on comparative fault may be obtained on motion (1) only where the basis for such judgment has been established by findings of fact previously made by the court or jury in the action in which the motion is filed, and (2) only by or against the persons who were parties to that action at the time said findings were made.

c. A motion for contribution permitted by this rule may be filed after final judgment has been entered in the action and the pendency of an appeal shall not deprive the court of jurisdiction to consider same.

d. A judgment for contribution on motion, where permitted under this rule, may be in the form of a declaratory judgment conditioned upon the future satisfaction by a party of one or more of the judgments entered in the action. [Report 1943; amended February 21, 1985, effective July 1, 1985]

Referred to in R.C.P. 240
See also §626.19

PROCEDURE FOR RULE 239 MOTIONS

240. Procedure. If motion under R.C.P. 239 is filed in an action already pending, the procedure shall be as in R.C.P. 237. Otherwise notice shall be served on the party against whom relief is sought at least ten days before the hearing thereof, stating when the motion will be filed and, in plain ordinary language, its nature and grounds, fixing the time and place of the hearing thereon. If the motion is not filed by the day specified it shall be deemed abandoned, if it is filed the court shall hear it at the time fixed in the notice without further pleadings, and give judgment according to the very right of the matter. [Report 1943; amendment 1967]

For declaratory judgments, a species of special action, see R.C.P. 261, et seq.

Time computed, §4.1(22)

MOTION IN LIMINE

Motions in limine are not specifically dealt with under the Iowa Rules of Civil Procedure, but have long been recognized as a useful tool by the Iowa courts. See

Note also Iowa Rule of Evidence 104(a) as a preliminary question issue.

> "104 a. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision 'b'. In making its determination it is not bound by the rules of evidence except those with respect to privileges."

E

Vernus WUNSCHEL, Appellant,

v.

Edna G. HOEFER, Appellee.

No. 2-57487.

Supreme Court of Iowa.

May 19, 1976.

Appeal was taken from an order of the Crawford District Court, James P. Kelley, J., sustaining defendant's motion to dismiss plaintiff's action for damages caused by unauthorized connection with plaintiff's sewer line. The Supreme Court, McCormick, J., held that the trial court abused its discretion in sustaining the motion to dismiss on grounds of plaintiff's failure to

comply with an order for more specific statement as to the time when the alleged wrong occurred where plaintiff made a good-faith effort to comply substantially with the order, where plaintiff did not know the exact time when the wrongful connection was made, and where it was reasonable for plaintiff to prefer to obtain the exact time through discovery of defendant.

Reversed and remanded.

1. Pleading ⇐426(1)

When party attempts to comply with order for more specific statement, error in order is waived.

2. Pleading ⇐367(6)

When motion to dismiss is predicated on insufficiency of attempted compliance with order for more specific statement, question is whether good-faith effort at substantial compliance was made; if it is not reasonably possible to comply with order, party is excused from compliance.

3. Pleading ⇐367(6)

Plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and who demonstrates good-faith effort to comply with order, must be deemed to have complied with order, and must not be disciplined by dismissal of his action.

4. Pleading ⇐42

It is not necessary for plaintiff to possess all evidence in support of his claim at time he files his petition.

5. Pleading ⇐367(6)

Trial court, in action for damages to sewer line and building, abused discretion by sustaining defendant's motion to dismiss on grounds of plaintiff's failure to comply with order for more specific statement as to time alleged wrong occurred, even though plaintiff had statement of witness estimating approximate time of defendant's alleged wrongful act, where plaintiff did not know exactly when the alleged wrong occurred, was not notified when it was done, and where, in attempt to comply with order, plaintiff gave approximate time period of occurrence of wrongful act and specified time that alleged damages occurred.

6. Pleading ⇐367(1)

Motion for more specific statement is not substitute for discovery, nor is it means to compel plaintiff to lay ground work for defendant's motion to dismiss.

7. Pleading ⇐367(6)

Order sustaining motion for more specific statement should be entered only if movant shows pleading to which motion is addressed is so indefinite he is unable to respond to it.

Warren L. Bush, of Wunschel Law Firm, P. C., Carroll, for appellant.

Allen Nepper, of Raun, Franck, Mundt & Nepper, Denison, for appellee.

Submitted to MOORE, C. J., and LeGRAND, UHLENHOPP, REYNOLDSON and McCORMICK, JJ.

McCORMICK, Justice.

This case was dismissed because of plaintiff's alleged failure to comply with an order sustaining a motion for more specific statement. We reverse and remand.

Plaintiff Vernus Wunschel alleged in his petition filed May 3, 1974, that he held a written easement for a sewer line through property of defendant Edna G. Hoefer in Crawford County dated February 23, 1960, and that the line was only to serve a telephone building on his property. He further alleged:

"5. That thereafter, at a time unknown to this Plaintiff, Defendant caused and constructed a sewer line, including a tile, to serve certain buildings, owned by Defendant, including a laundromat and grocery store and connected said sewer line on Plaintiff's sewer line, which traverses Defendant's property.

"6. That said construction was done secretly and without Plaintiff's knowledge or opportunity to seek a prior in-

junction and without Plaintiff's permission."

He alleged that defendant's unauthorized connection caused his line to back up, damaging his sewer line and building. He asked for actual and exemplary damages.

Defendant filed a motion to strike and, alternatively, a motion for specific statement. The motion for specific statement included the following request relating to paragraph five of the petition:

"Let the Plaintiff set forth at least the month and year that the Defendant is supposed to have caused and constructed the sewer line as alleged in paragraph 5 of the Plaintiff's petition."

Plaintiff resisted the motions. In resisting the motion for more specific statement, he alleged the matters sought were subject to discovery and were not requisites of pleading. The trial court overruled the motion to strike but sustained the motion for more specific statement.

In purported compliance with the portion of the ruling requiring a more specific statement of paragraph five of the petition, plaintiff filed an amendment substituting the following new paragraph five:

"5. That thereafter, at a time unknown to this Plaintiff, *but sometime after February 23, 1960, and prior to commencement of this action,* Defendant caused and constructed a sewer line, including a tile, to serve certain buildings owned by the Defendant including a laundromat and a grocery store, and connected said sewer line on Plaintiff's sewer line, which traverse's Defendant's property." (Italics added).

The italicized language was added to the prior language of paragraph five in an attempt to comply with the order. Defendant then filed a motion to dismiss on the ground of plaintiff's alleged failure to comply with the trial court's order for more specific statement. In resisting the motion to dismiss, plaintiff alleged he was not a resident of the community, did not observe the unauthorized sewer connection, and was not notified when it was made. He said he had a statement from a witness who said the connection was made about two and one-half years before April 1974. Plaintiff also said, "The only way the exact date could be determined is through discovery procedures."

The trial court sustained defendant's motion to dismiss and that ruling is challenged in this appeal.

[1, 2] General principles applicable to our review are discussed in *Lamp v. Williams*, 222 Iowa 298, 268 N.W. 543 (1936). Although that case antedated the adoption of the rules of civil procedure, the principles discussed in it retain their validity. When a party attempts to comply with an order for more specific statement, error in the order is waived. However, when a motion to dismiss is predicated on the insufficiency of attempted compliance with such an order, the question is whether a good faith effort at substantial compliance was made. If it is not reasonably possible to comply with the order, the party is excused from compliance.

[3] The controlling principle is accurately summarized in headnote 3 to the *Lamp* case in the Iowa Reports:

"A plaintiff who is ordered to make his petition more specific in certain particulars which he is actually or reasonably unable to state, and so demonstrates in a good faith effort to comply with the order, must be deemed to have complied with the order, and must not be disciplined by a dismissal of his action." 222 Iowa at 298, 268 N.W.2d at 543.

We believe this is such a case.

[4, 5] In attempting to comply with the order for more specific statement, plaintiff made his petition as specific as reasonably possible. He said he did not know exactly when defendant made the wrongful connection because he was not present when it was done, was not notified when it was done, and learned it was done only when it damaged his property. The times of such damages were specified in the petition. It is not necessary for a plaintiff to possess all the evidence in support of his claim at the time he files his petition. *Carter v. Jerni-*

gan, 227 N.W.2d 131, 135 (Iowa 1975). Although plaintiff had the statement of a witness estimating the approximate time of defendant's alleged wrongful act, it was reasonable for plaintiff to prefer to obtain the exact time through discovery of defendant. We hold plaintiff made a good faith effort to comply substantially with the order for more specific statement, he was reasonably unable to be more specific, and the trial court abused its discretion in sustaining the motion to dismiss.

In so holding we point out as the court did in *Lamp v. Williams*, supra, 222 Iowa at 303, 268 N.W. at 545, that the order for more specific statement imposed an unwarranted and unnecessary burden on plaintiff, not only requiring him to plead evidence contrary to the purpose of a motion for specific statement but requiring him to plead evidence he did not possess.

[6] We emphasize that rule 112, Rules of Civil Procedure, provides, "A party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him to plead to it and for no other purpose." A motion for more specific statement is not a substitute for discovery *Hagenson v. United Telephone Company*, 164 N.W.2d 853, 857–858 (Iowa 1969). Nor is it a means to compel a plaintiff to lay the groundwork for a defendant's motion to dismiss. *Goldstein v. Brandmeyer*, 243 Iowa 679, 683, 53 N.W.2d 268, 271 (1952).

[7] An order sustaining a motion for more specific statement should be entered only if the movant shows the pleading to which the motion is addressed is so indefinite he is unable to respond to it. In the present case, defendant's ability to respond to plaintiff's petition did not depend on having the date of the alleged wrong set out in the petition. If defendant did the act alleged, she would know when she did it. If she did not do it, her ability to deny it would not require her to know when plaintiff claimed she did it. She could obviously plead to the allegation without a more specific statement.

It was an abuse of trial court discretion to dismiss plaintiff's petition upon plaintiff's failure to do something which was not reasonably possible for him to do and which he should not have been required to do

REVERSED AND REMANDED.

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COMPARATIVE FAULT
RECUSAL

BY PHIL WILLSON
SMITH, PETERSON, BECKMAN & WILLSON
COUNCIL BLUFFS, IOWA

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COMPARATIVE FAULT
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COUNCIL BLUFFS, IOWA

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I. WHEN CHAPTER 668 APPLIES.

A. When the fault of more than one person is being compared.

The principles of comparative fault are triggered by any claim involving the fault of more than one party. In the usual case, the fault of plaintiff and defendant are being compared. However, if there is either no claim of fault on the part of the plaintiff, or insufficient evidence to submit a claim of fault of the plaintiff, and there are two defendants claimed to be at fault, the principles of comparative fault are applicable. Johnson v. Junkmann, 395 N.W.2d 862, 867 (Iowa 1986). Urbandale v. Frevert-Ramsey-Kobes, Arch., 435 N.W.2d 400, 402 (Iowa App. 1988) holds that comparative fault applies in a case where the plaintiff claimed negligence of defendant in designing a building and defendant claimed negligence of plaintiff in its use of the structure.

B. Comparative fault does not apply unless the instructions give the jury more than one line on which to assign fault.

Thus, a determination as to whether comparative fault applies is not made until the instructions are submitted to the jury. The controlling language is Iowa Code §668.3(2) which refers to a claim "involving the fault of more than one party". Fault cannot be allocated to someone against whom there is no claim for relief being made. Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986). Fault cannot be assigned to a party who obtains a directed verdict. Payne Plumbing v. Bob McKiness Excavating, 382 N.W.2d 156 (Iowa 1986).

II. CONFLICT OF LAWS.

As provided in Restatement (Second) of Conflict of Laws, §§164 and 165, South Dakota Comparative Fault law applies to a claim made by an Iowa resident injured while on a job in South Dakota. Baedke v. John Morrell & Co. (1990 N.D. Iowa) 748 F.Supp. 700.

The Baedke case involved a claim by an Iowa resident whose husband suffered fatal injuries while working at a South Dakota meat packing plant. The claim included claims for the husband's injuries and for the plaintiff's own and her minor children's loss of consortium. The court held that under Iowa Conflict of Law Rules and in accordance with Restatement (Second) of Conflicts of Laws, §§164 and 165, South Dakota, rather than Iowa law, applied to issues relating to consortium and contributory negligence. The court did not determine which state's law regarding wrongful death should apply.

In Kozoway v. Massey-Ferguson, Inc., 722 F.Supp. 641 (D. Colo. 1989) Iowa law, rather than the law of Alberta, Canada, was applied to an action by an Alberta user of a hay baler against an Iowa manufacturer of the baler and a Maryland corporation for which the baler was manufactured. Iowa law was applied even though the baler was sold in Canada to the user's father. The court held that Iowa had the most significant relationship to the action since Massey-Ferguson's principal place of business was in Iowa, it conducted field tests in Iowa, and the plaintiff alleged that the acts and omissions that caused the injuries occurred in Iowa. The court concluded "it appears that the defendant's allegedly wrongful conduct all occurred in Iowa, and it is merely fortuitous that the plaintiff's injury happened in Alberta." 722 F.Supp. at 643.

III. HARMS COVERED.

A. Comparative fault is limited to physical harm to person or property.

Iowa Code §668.1(1) limits "fault" to claims "toward the person or property" of the claimant.

The language of Iowa Code §668.1 follows the provisions of §1(b) of the Uniform Comparative Fault Act. The comment to the Uniform Act states that it is confined to physical harm to person or property and consequential damages deriving from the harm such as medicals, lost earnings, costs of repair or replacement of property. The comment indicates that comparative fault does not apply to matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation unless a court determines that the common law of the state would make the application.

In Darnell Photographs, Incorporated v. Great American Insurance Company, 33 Colo. App. 256, 519 P.2d 1225 (1974) the court held that the alleged damage to an insured due to the negligent failure of defendant insurance company to increase the coverage was an "injury to property" as to which comparative negligence would apply.

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In Lipes v. Atlantic Bank of New York, 69 A.D.2d 127, 419 N.Y.S.2d 505 (1979) the term "injury to property" was held to include injuries arising from commercial transactions.

However, in Behring International, Inc. v. Greater Houston Bank, 662 S.W.2d 642 (Tex. App. 1983) the court held that U.C.C. §3-406 which makes negligence that "substantially contributes" to an unauthorized signature a complete defense was the controlling law, therefore, comparative fault would not apply where plaintiff's negligence and fraud were raised as a defense to a claim of breach of contract of deposit and conversion.

Comparative fault has been applied to claims of securities violations based on negligence. Starkenstein v. Merrill, Lynch, Pierce, Fenner and Smith, Inc., 572 F.Supp. 189 (D. Fla. 1983).

In a wrongful discharge case, which included claims of violation of ADEA, lack of cause, and negligence in conducting job evaluations, a Michigan Federal Court applied comparative fault and reduced the award by 83% due to the employee's contributory negligence in bringing about his own discharge. Chamberlain v. Bissell, Inc., 547 F.Supp. 1067, 1083, 1084 (W.D. Mich. 1982).

Analogous principles are involved in strict products liability cases, which are also limited to personal injury or property damage. Economic losses relating to a buyer's disappointed expectations are a matter of contract recovery rather than under strict liability. Moorman Mfg. Co. v. National Tanks Co., (Ill. 1982) 435 N.E.2d 443. Most cases seem to permit strict products liability recovery for damage to the product itself resulting from the defect in the product. See for example Pennsylvania Glass Sand v. Caterpillar Tractor Co., (3rd Cir. 1981) 652 F.2d 1165. The Pennsylvania case points out that tort law rests on obligations imposed by law rather than by bargain and that a products liability tort case is based on unreasonable risk of

injury to person or property, while contract law protects expectation interests and provides rules relating to performance or quality of products. See 652 F.2d at 1169. See also Hart Engineering Co. v. FMC Corp., (D.C. R.I. 1984) 593 F.Supp. 1471, 1482; Consumers Power Co. v. Curtiss-Wright Corp., (3rd Cir. 1986) 780 F.2d 1093; Butler v. Pittway Corp., (2nd Cir. 1985) 770 F.2d 7, 11. The Butler case also points out that in contract cases, the buyer seeks to be placed in a position he would have been in had the seller performed while in personal injury or property damage actions the plaintiff seeks to be placed in a position he occupied prior to the injury. See 770 F.2d at 11.

In a negligence case, it was held that innkeepers could not bring an action for economic losses to their business due to alleged negligence of defendant contractor and seller of steel which cracked causing the closing of the bridge and fewer customers. Nebraska Innkeepers v. Pittsburg-Des Moines Corporation, 345 N.W.2d 124, 126 (Iowa 1984). In Manning v. International Harvester Co., 381 N.W.2d 376 (Iowa App. 1985) a farmer brought an action against the manufacturer of a planter alleging that a defect in the equipment caused a reduction in the corn crop. The court held that this was property damage and not purely indirect economic damage -- therefore, tort damages were recoverable. Nelson v. Todd's Limited, 426 N.W.2d 120 (Iowa 1988) holds that purely economic injuries without accompanying physical injury to a user or consumer or to the user or consumer's property are not recoverable under strict liability. The court held that a claim of butcher shop owners-operators against the manufacturer of meat curing products could not recover in tort for a claimed spoiling of quantities of meat prepared with the equipment and any recovery would be limited to an express warranty theory.

IV. CLAIMS SUBJECT TO COMPARATIVE FAULT.

A. Negligence. Section 668.1(1).

B. Recklessness. Section 668.1(1).

Since we no longer have a guest statute, we have no causes of action based solely on recklessness. Recklessness is one element of a claim of tortious infliction of severe emotional distress. See Iowa Civil Jury Instruction 2000.1. ICJI 2000.3 provides "A person's conduct is reckless if they know with a high

degree of probability that emotional distress will result and they act with deliberate disregard of that probability." Sechler v. State, 340 N.W.2d 759, 764 (Iowa 1983) holds that gross negligence is a higher degree of negligence rather than a different kind. Sechler defines gross negligence as something less than conscious indifference while recklessness is a heedless disregard for or indifference to others. Wantonness is described as meaning something more than recklessness. Recklessness has been held to be of sufficient culpability to disqualify a party from contribution. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 170 (Iowa 1984). In a claim involving intentional infliction of emotional distress, the court, in M.H. by and through Callahan v. State, 385 N.W.2d 533, 539 (Iowa 1986) defined recklessness as "A heedless disregard for or indifference to others, which may include willfulness or wantonness; however, conduct may be reckless without being willful and wanton." Citing authorities.

There is no single definition of recklessness. In any event, it is clear that Chapter 668 provides that to the extent recklessness is involved in a case, the principles of comparative fault apply, except where a contribution claim is involved.

C. Strict tort liability. Section 668.1(1).

D. Breach of warranty (claims for personal injury or property damage). Section 668.1(1).

E. Unreasonable assumption of risk not constituting an enforceable express consent. Section 668.1(1). See discussion of affirmative defenses in Division VIII of this outline.

F. Misuse. Section 668.1(1). See discussion of affirmative defenses in Division VIII of this outline.

G. Unreasonable failure to avoid an injury or to mitigate damages. Section 668.1(1). See discussion of affirmative defenses in Division VIII of this outline.

V. CLAIMS NOT SUBJECT TO COMPARATIVE FAULT.

A. General Rules. The comment to §1 of the Uniform Comparative Fault Act sets out general rules for determining whether comparative fault should apply. The comment states that the Act does not include intentional

torts, however, a court could determine, as a matter of common law, that comparative fault should be applied in an individual case. The comment points out that nuisance may be intentional, negligent or subject to strict liability and the comment states that in the latter two instances the Act would apply but not in a case in which the defendant intentionally inflicts the injury on the plaintiff. The Wisconsin Supreme Court held in Crest Chevrolet-Oldsmobile-Cad. v. Willemsen, 129 Wis. 2d 129, 384 N.W.2d 692 (Wis. 1986) that alleged flooding of the dealer's parking lot caused by development of defendant's adjoining land was an intentional nuisance action and, therefore, comparative fault principles were inapplicable. (For a discussion of the law of nuisance see Eidsmoe "An Anatomy of a Nuisance", 1979 Annual Meeting, Iowa Defense Counsel, pp. 17-34.) The comment further states that a tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault.

B. Iowa Cases.

1. In a dram shop case, fault of an intoxicated patron is not a defense because comparative fault does not apply. Slager v. HWA Corp., 435 N.W.2d 349, 353 (Iowa 1989). The court was influenced by the fact that neither contributory nor comparative negligence was a defense to a dram shop action prior to the adoption of Chapter 668. The court further pointed out that the legislature could have easily added dram shop claims to Chapter 668 if the legislature had intended for the chapter to cover those actions.

2. Comparative principles of §668.3(1) do not apply to a claim for punitive damages. Godbersen v. Miller, 439 N.W.2d 206, 209 (Iowa 1989). The court held that punishment, not compensation, is the goal and that is one reason comparative fault should not be applied to punitive damages.

3. Comparative fault does not apply to a fraud claim. Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 180, 181 (Iowa 1990). The court held that prior to the adoption of Chapter 668, negligence was not a defense to fraud or to an intentional tort,

therefore, since a tort of fraud is not mentioned in Chapter 668, comparative fault would not apply.

VI. PARTIES AMONG WHOM FAULT IS ALLOCATED.

A. Parties are defined in Iowa Code §668.2.

Fault can be compared among claimants, persons named as defendant, persons released pursuant to §668.7, and third party defendants. Thus, the comparative fault chapter excludes unknown parties or phantom defendants as parties to whom fault can be assigned.

B. Fault is only compared among parties as to whom there is an issue of breach of duty to a plaintiff.

When a third party defendant is in the case only on an indemnity claim based upon an alleged duty from the third party defendant to the third party plaintiff, any fault of the third party defendant is not considered in the allocation of fault under Chapter 668. Reese v. Werts Corp., 379 N.W.2d 1, 5, 6 (Iowa 1985).

C. Fault of a third party defendant, who has been added after the statute of limitations applicable to plaintiff's claim has run, may be subject to comparative fault.

After the plaintiff's claims are barred by the statute of limitations, a defendant may join and make a contribution claim against a third party defendant who could have been subject to a claim by the plaintiff prior to the time the limitations ran. The claims of the third party plaintiff for contribution would not be barred since the period of limitations does not commence until a party has paid more than their share of an obligation. The Supreme Court in dicta has indicated that if a third party defendant is properly brought into an action, the plaintiff may then ask for relief against that third party defendant even though the period of limitations would otherwise have barred the claim. See Reese v. Werts Corp., 379 N.W.2d 1, 5 (Iowa 1985) and Betsworth v. Morey's and Raymond's, 423 N.W.2d 196, 198 (Iowa 1988).

VII. PARTIES TO WHOM FAULT CANNOT BE ALLOCATED.

A. Parties who have been dismissed from the lawsuit. Payne Plumbing v. Bob McKiness Excavating, 382 N.W.2d 156 (Iowa 1986); Dumont v. Keota Farmers Co-op, 447 N.W.2d 402

(Iowa App. 1989). It does not matter whether the dismissal is a voluntarily dismissal by the plaintiff or a directed verdict entered by the court.

B. Fault cannot be assigned to unidentified or unknown persons. Baldwin v. City of Waterloo, 372 N.W.2d 486, 493 (Iowa 1985).

C. Fault cannot be assigned to a party who has immunity such as the employer of the plaintiff. Mermigis v. Service Master Industries, Inc., 437 N.W.2d 242, 247 (Iowa 1989).

D. Fault cannot be assigned to a person named as a defendant but not served with process. Collier v. General Inns Corp., 431 N.W.2d 189 (Iowa App. 1988).

E. Fault cannot be assigned to a party who has been joined merely for the purpose of apportionment of fault without a basis for making a claim for relief against that party. Peterson v. Pittman, 391 N.W.2d 235, 238 (Iowa 1986). Likewise, fault cannot be assigned to a third party defendant who owes no duty to plaintiff. Reese v. Werts Corp., 379 N.W.2d 1, 5, 6 (Iowa 1985). Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 922, 923 (Iowa 1990).

F. Fault cannot be assigned to a party who is not liable to the plaintiff, therefore, the plaintiff's spouse's consortium claim cannot be reduced by any fault assigned to her husband. Schwennen v. Abell, 430 N.W.2d 98, 102 (Iowa 1988). A note in 75 ILR 713 "A More Equitable Approach to a Loss of Spousal Consortium" points out the unfairness resulting when a tortfeasor is only partially at fault and criticizes the present rule that "punishes a party who is 5% at fault as severely as one who is 100% at fault."

G. Fault cannot be assigned to a party joined by plaintiff after the expiration of the statute of limitations. Betsworth v. Morey's and Raymond's, 423 N.W.2d 196 (Iowa 1988).

VIII. CAUSATION.

Section 668.1(2) provides that the legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault.

A. Cause in fact is often expressed in terms of the test: but for the defendant's conduct, the harm or damage would

not have occurred. State v. Marti, 290 N.W.2d 570, 585 (Iowa 1980). This concept was later modified to require that conduct must have been a substantial factor in bringing about the harm. Iowa Elec. Light & Power v. General Elec. Co., 352 N.W.2d 231, 234 (Iowa 1984); Smith v. Shaffer, 395 N.W.2d 853, 857 (Iowa 1986). See Iowa Civil Jury Instruction 700.3. Cause in fact is a question for the jury.

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B. Legal causation is a question of law to determine whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred. State v. Marti, 290 N.W.2d 570, 585 (Iowa 1980). Proximate cause has also been defined as "a reasonably close causal connection". Bockelman v. State, Dept. of Transp., 366 N.W.2d 550, 552 (Iowa 1985). Ordinarily, a proximate cause is a decision for the jury. In Urbandale v. Frevert-Ramsey-Cobes, Arch., 435 N.W.2d 400 (Iowa App. 1988). Plaintiff claimed damages from negligent design of the building and defendant claimed plaintiff was negligent in use of the building. The court held that cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault and that these issues were for the jury and could be decided as a matter of law only in exceptional cases.

C. An act of God is not an act of a party, therefore, such a claim is not subject to comparative fault but can be used as a defense if it is the sole proximate cause of the harm in question. Renze Hybrids, Inc. v. Shell Oil, 418 N.W.2d 634, 641 (Iowa 1988). See Iowa Civil Jury Instruction 700.7.

IX. JOINDER OF PARTIES.

A. JOINDER OF ALL PARTIES IS NOT REQUIRED.

In Selchert v. State, 420 N.W.2d 816 (Iowa 1988) the court held that a plaintiff could file a separate suit against additional parties even though plaintiff had previously tried a lawsuit against different parties arising out of the same incident. In other words, the court held that the permissive joinder rule (Rule 24) applied rather than the "indispensable parties" rule under Rule 25 of the Rules of Civil Procedure.

Judge Stuart reached a different result in Leick v. Schnellpressenfabrik Ag Heidelberg, 128 F.R.D. 106, 108,

109 (S.D. Iowa 1989). Judge Stuart held that Selchert was not binding because of the differences in the Iowa and Federal Rules for determining whether a person is indispensable. Judge Stuart concluded that a joinder was required because otherwise a party might be assessed fault for which it was not responsible and the smaller number of parties might result in unfair joint and several liability.

The Iowa Supreme Court pointed out in Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 923 (Iowa 1990) that its strict interpretation of the definition of party in §668.2 "would serve as a significant incentive for both plaintiffs and defendants to join all available parties who may be liable."

B. DEFENDANTS ARE NOT LIABLE FOR THIRD PARTY'S FAULT.

If a defendant joins a third party and succeeds in having fault assigned to the third party based on fault of the third party toward the claimant, the defendant is not liable for the fault assigned to the third party. See Schwennen v. Abell, 430 N.W.2d 98, 103, 104 (Iowa 1988) in which the court pointed out that plaintiff in such situation must make a claim directly against the third party defendant in order to protect the plaintiff's rights of recovery.

The United States of Court of Appeals for the Eighth Circuit applied this principle in an opinion filed August 12, 1991 in the case of Christopherson v. Deere, (8th Cir. 1991) _____ F.2d _____. In the Christopherson case, the defendant Deere joined a third party claiming fault of the third party in breaching a duty to the plaintiff. The plaintiff did not amend to make any claim against the third party (who was the father of the injured plaintiff). The jury assigned 20% fault to the plaintiff, 50% fault to Deere, and 30% to the third party defendant. The trial court held that plaintiff was not entitled to any recovery for the percent of fault assigned to the third party defendant and that Deere was only liable for the 50% of fault assigned to it. The case was affirmed on appeal. Plaintiff contended that because Deere was found to be 50% at fault, it was jointly and severally liable for both the percent assigned to it and the percent assigned to the third party defendant. However, the Court of Appeals held that Chapter 668 does not make a defendant

jointly and severally liable to a claimant for the fault of a party not sued by the claimant.

X. NEW DEVELOPMENTS IN AFFIRMATIVE DEFENSES.

A. There has been difficulty in integrating the concept of assumption of risk into the comparative fault system. The comment to §1 of the Uniform Comparative Fault Act states:

> "'Assumption of risk' is a term with a number of different meanings--only one of which is 'fault' within the meaning of this Act. This is the case of unreasonable assumption of risk, which might be likened to deliberate contributory negligence and means that the conduct must have been voluntary and with knowledge of the danger. As used in this Act, the term does not include the meanings (1) of a valid and enforceable consent (which is treated like other contracts), (2) of a lack of violation of duty by the defendant (as in the failure of a landowner to warn a licensee of a patent danger on the premises), or (3) of a reasonable assumption of risk which is not fault and should not have the effect of barring recovery)."

In Arnold v. City of Cedar Rapids, 443 N.W.2d 332 (Iowa 1989), in a suit by a spectator who was injured at a softball game, the court indicated that the parties had labeled the controlling question as one involving assumption of risk. However, the court stated "such a characterization has become increasingly inappropriate and misleading." 443 N.W.2d at 333. The court held that the case really involved primary assumption of risk which is not an affirmative defense but is an alternate expression for the proposition that the defendant was not negligent either because no duty was owed or no duty was breached. The court indicated that "for accuracy and clarity, it is preferable, as suggested in Nichols (380 N.W.2d 392) to frame the issue in terms of whether a duty is owed."

In Rolfes v. International Harvester Co., 817 F.2d 471, 474 (8th Cir. 1987) it was held to be error to instruct the jury on the assumption of risk since there was no evidence that the plaintiff was aware that bolts were loose or missing from the tractor seat.

Iowa Civil Jury Instruction 400.9 has been extensively revised and is set out at page 42 of this outline. The most important change in the Revised Instruction is the adding of a requirement that in addition to being unreasonable, the plaintiff's choice must be made "freely and voluntarily".

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B. MITIGATION OF DAMAGES.

Section 668.1(1) includes within the definition of "fault" both unreasonable failure to avoid an injury or to mitigate damages. There have not been any cases discussing the concept of "unreasonable failure to avoid an injury". The comment to §1 of the Uniform Act states that the doctrine of "avoidable consequences" is expressly included in the coverage. Prosser and Keeton on Torts (5th Ed.) at pages 458-461, states that the rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages. As an example it is stated that if a plaintiff is injured in an automobile accident and then fails to obtain proper medical care, this concept would bar only damages for the subsequent aggravated condition. However, Prosser and Keeton's citations deal with contributory negligence as a complete defense. Under §668.1, avoidable consequences would be one of the factors for allocating fault to a claimant.

In Miller v. Eichhorn, 426 N.W.2d 641, 643 (Iowa App. 1988) the court held that failure to consult a doctor on a regular basis would not be evidence of failure to mitigate damages unless there was a showing that such consultations would have mitigated the damages. The court stated that plaintiff had a duty to use ordinary care in consulting a physician and testimony by a doctor that additional chiropractic treatments would have helped plaintiff's condition supported the submission of mitigation of damages and was evidence from which the jury could find that plaintiff did not use due care following her doctor's advice.

In Fuches v. S.E.S. Co., 459 N.W.2d 642, 643 (Iowa App. 1990) the court held that an injured person is under no absolute duty to follow a physician's advice in order to minimize damages. The duty is to use ordinary care. A person may be excused from mitigating damages if they lack sufficient financial resources to do so. The court further added that in order to find a failure to undergo

medical treatment was failure to mitigate damages, there must be a showing that such treatment would in fact have mitigated the damages.

Welter v. Humboldt County, 461 N.W.2d 335 (Iowa App. 1990) involved a claim against the county and the county's contractor for alleged damages resulting from weed spraying in the county right-of-way. Apparently, comparative fault was not involved but there was an issue of failure to minimize damage. The trial court's instruction to the jury closely followed Restatement (Second) of Torts, §918(1)-(2) (1979) stating that plaintiff cannot recover for any damage caused by plaintiff's failure to use reasonable means to minimize. The Welter decision has been added by the Instructions Committee as additional authority for Iowa Civil Jury Instruction 400.7, a copy of which is set out on page 43.

Tamberg v. Ackerman Investment Co., _____ N.W.2d _____ (Iowa, July 1991), W.L. 130244, involved a plaintiff 5'11" tall who weighed 309 pounds and who injured his back when he fell while trying to turn off whirlpool jets in a motel. The defendant alleged failure to mitigate damages by losing weight after the accident. Plaintiff admitted that he had been advised to lose weight and that he had not been as faithful in following his diets as he should have been. The trial court submitted failure to mitigate damages in addition to other grounds of fault and the jury assessed 70% fault to the plaintiff and 30% to the defendant. The Supreme Court held that unreasonable failure to attempt to lose weight pursuant to medical advice can be assessed as fault if weight loss will mitigate damages. The court said that a plaintiff is not required to actually lose weight in order to mitigate damages but there must "be a reasonable attempt to do so." Since plaintiff admitted that he was not as faithful in following his diet as he should have been, a jury could find that he did not reasonably mitigate damages.

C. PRODUCTS LIABILITY.

Revised Iowa Civil Jury Instructions relating to strict products liability are set out at pages 44 through 54.

XI. STATUTE OF LIMITATIONS.

Section 668.8 states that the filing of a Petition tolls the statute of limitations for the commencement of an action against all parties who may be assessed any percentage of fault. However, in Betsworth v. Morey's & Raymond's, 423 N.W.2d 196, 198 (Iowa 1988) the court held that plaintiff could not add defendants to a lawsuit after the period of limitations had expired. Therefore, Iowa Code §668.8 does not seem to have any effect in tolling the statute of limitations.

In Insurance Co. of N. America v. Coast Catamaran, 753 F.Supp. 804 (S.D. Iowa 1991) two insurance companies brought a products liability claim against a sail boat manufacturer in which the plaintiffs sought contribution toward amounts the plaintiff insurers had pain in settlement with injured parties. The statute of limitations was not raised as a defense and thereafter plaintiffs voluntarily dismissed their action without prejudice because of the unavailability of a trial witness. Plaintiffs later attempted to reopen the case and defendants resisted by raising the statute of limitations among other defenses. The court held that the plaintiffs' claim for contribution was barred by Iowa Code §668.6 which requires that an action for contribution be made not later than one year after making the payment that discharged the liability to other parties.

XII. APPORTIONMENT OF DAMAGES -- VERDICT FORMS.

A. ALLOCATING PERCENTAGES OF FAULT.

Iowa Code §668.3(3) provides:

> "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed."

The language of the Iowa Code section is taken from §2(b) of the Uniform Act. The comment to the Uniform Act points out that degrees of care may be important in determining whether there is liability but once liability has been established, the rules as to degrees of care do not play a part in determining the relative proportion of fault. The comment points out, however, that the policy behind rules as to degrees of care may be important. For example, the comment states that an error in driving on the part of a bus driver with a load of passengers may

properly produce an evaluation of greater fault than the same error on the part of a housewife gratuitously giving her neighbor a ride to the shopping center. Likewise, an automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence, properly be held to a greater measure of fault than another manufacturer who was negligent in producing a product that does not have the same risks of injuries. The comment also indicates that the fact-finder will give consideration to the relative closeness of the causal relationship of the conduct to the defendants and the harm to the plaintiff because degrees of fault and proximity of causation are inextricably mixed.

The Supreme Court of Louisiana, in Watson v. State Farm Fire and Casualty Insurance Co., 469 So.2d 967 (La. 1985) sat out the following rules for allocating fault:

> "In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the . . ."

The jury is given very little guidance as to how to allocate fault. Iowa Civil Jury Instruction 400.2 instructs the jury:

> "In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the [plaintiff] [defendant(s)] [third party defendant(s)] [persons who have been released], and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages."

B. ALLOCATION OF DAMAGES.

Iowa Code §668.3 was amended in 1987 to add a new subparagraph 8 which requires the court to submit special interrogatories requiring the jury to make findings on each specific item of requested damages indicating that portion awarded for past damages and that portion awarded for future damages. If there is no jury, the court is required to make such findings.

C. VERDICT FORMS.

In a typical case, a jury would be given the following list of items of damage and directed to either insert a dollar amount or a zero for each item:

1. Past medical expenses $_____

2. Future medical expenses $_____

3. Past pain and suffering $_____

4. Future pain and suffering $_____

5. Past loss of full mind and body $_____

6. Future loss of full mind and body $_____

TOTAL (Add the separate items of damage) $_____

D. EFFECTS OF ALLOCATING DAMAGES IN THE VERDICT.

1. Subrogation rights are affected as set out in the next division of this outline.

2. Interest on items awarded for future damages does not begin until the entry of judgment.

3. Appeal rights are affected. If one item of damage is held to be improper, the courts know the amount of that item, and can reduce the verdict accordingly.

XIII. SUBROGATION RIGHTS.

In Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143 (Iowa 1986) Farm Bureau served notice in its insured's personal injury lawsuit of a claim of subrogation rights for payment of medical expenses. In the third party action a settlement was

reached (without participation by Farm Bureau). The settlement documents allocated specific amounts to specific subrogation claims and a separate settlement check was made out payable jointly to Farm Bureau and its insured. The trial court ruled that Farm Bureau was entitled to be reimbursed only if its insured had been "made whole" by the settlement and the court concluded that Farm Bureau was not entitled to reimbursement because the insured had not been made whole. Farm Bureau agreed that it could not recover under its subrogation provision unless its insured had been "made whole". The insured testified that she believes she would have received more if the case had gone to trial, but that she accepted less to avoid the delay and mental stress of a trial. Farm Bureau argued that in a settlement the insured is presumed to be "made whole". The trial court made its decision based upon its findings of fact rather than any presumption. The Supreme Court reversed the decision of the trial court and held that Farm Bureau was entitled to recover its subrogation claim subject to a determination by the trial court as to attorney fees. The Supreme Court expressed no opinion on attorney's fees. In the footnote the court pointed out that if the insured and the third party "perhaps being less than solicitous about the interest of a subrogee" attempt to reduce the subrogation claim by allocating little or no reimbursement for medical expenses, a mini-trial might be needed such as the type used in the Wisconsin case of Rimes v. State Farm Mutual Automobile Insurance Co., 106 Wis.2d 263, 316 N.W.2d 348 (1982).

A year after the Ludwig decision, the legislature added subparagraphs 3 and 4 to Iowa Code §668.5 to deal with subrogation rights. In subsection 3 the court stated that subrogation rights could not exceed the portion of the judgment or verdict specifically related to such losses as itemized in the judgment of verdict pursuant to subsection 8 of §668.3. Subsection 4 applied the provisions of subsection 3 to settlement recoveries "but only to the extent that the settlement was reasonable."

In Principal Cas. Ins. Co. v. Norwood, 463 N.W.2d 66 (Iowa 1990) the insurer brought a declaratory judgment action to determine whether it was required to pay attorney fees on its subrogated share of a settlement reached by the insured's attorney. The court described the issue as conflicting policies between the claim of the insured that the insurer would have a windfall and unjustly enriched it if it obtained the entire subrogation claim without any expense of attorney fees and the argument of the insurer that it should not be required to pay legal expenses under a contract for legal

services as to which it was not a party. The Supreme Court pointed out that at common law, the purpose of subrogation is to prevent unjust enrichment of one party at the expense of another. Subsection 3 of Iowa Code §668.5 allows deduction of legal administrative expenses from subrogation claims where a claim is going to judgment. The insurer argued that subsection 4 dealing with settlements does not make the same provision for deducting legal and administrative expenses. The Supreme Court held that the subrogee must pay a pro rata share of legal and administrative expenses regardless of whether the recovery is based on a judgment or a settlement "to the extent that the settlement was reasonable."

There is no clear decision as to what happens relating to attorney fees if the subrogation insurer intervenes through its own attorneys. In cases where the insurer has not intervened, the court has pointed out that by failing to intervene, the insurer has saved attorney fees that it would have been required to pay if it had pursued the claim.

XIV. TELLING THE JURY THE EFFECT OF ITS ANSWERS TO SPECIAL VERDICTS.

Special verdicts were developed to reduce any tendency of the jury to base a verdict on the result the jury wanted to obtain. It was assumed that if the jury merely made findings of facts, there would be less tendency to be influenced by sympathy or prejudice. Accordingly, juries are not ordinarily told the impact of their findings on the ultimate result in the case. See Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985).

However, Iowa Code §668.3(5) requires the court to give instructions and permit evidence and argument "with respect to the effects of the answers to be returned to the interrogatories submitted under this section."

Reese v. Werts Corp., 379 N.W.2d 1, 3-4 (Iowa 1985) held that it was error for the trial court to refuse to tell the jury the effects that its answers to special verdicts would have on joint and several liability. It could be argued that since §668.3(5) only requires that the jury be told the effects of its answers to interrogatories submitted under "this section" that the duty of the trial court applies only to answers relating to percentages of fault which is the subject matter of §668.3. However, the court pointed out that giving such an instruction would mislead the jury because it would only be partially correct if it did not also explain the effects of

answers on joint and several liability which was covered by §668.4.

In Schwennen v. Abell, 430 N.W.2d 98, 104 (Iowa 1988) the Supreme Court decided that one of the parties to whom fault was assigned should not have been included in the list (since the claim involved that claimant's spouse), therefore, the court held that a new trial was needed to have fault allocated among the proper parties. The court seemed to make its decision on the need for a new trial on the ground that the jury should understand the effect of its allocations on joint and several liability and the effects could be quite different if fault were allocated among one less party. When the consortium claim was retried, the second jury made an entirely different allocation of fault. In the first trial, involving the husband's bodily injuries, the jury allocated 63% fault to one driver, 27% fault to another driver and 10% to the county. On retrial of the consortium claim, the jury allocated 85% fault to the county and 15% to the driver who collided with plaintiff's husband.

Therefore, it appears that where one spouse is making a bodily injury claim and the other spouse is making a loss of consortium claim, the court must ask the jury to make two separate allocations of fault where fault may be allocated to more than a single defendant.

XV. COLLATERAL SOURCES.

A study commission appointed by the legislature made a report in 1986 which included recommendations relating to the collateral source rule. In 1987 the legislature adopted the majority report of the commission relating to collateral sources. Iowa Code §668.14 adopted the commission recommendations by providing that evidence of collateral sources for necessary medical care, rehabilitation services and custodial care "shall" be admitted into evidence unless the payments are pursuant to a state or federal program or from assets of the claimant or members of the claimant's immediately family. The Code section provides that if evidence and arguments are permitted, the court shall permit evidence and argument as to the costs of obtaining the benefits and any rights of indemnification or subrogation. If evidence and argument is permitted, the court is directed to submit special interrogatories to the jury or make findings indicating the "effect of such evidence or argument on the verdict."

In Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990) the trial court refused to permit introduction of evidence that plaintiff had received worker's compensation benefits. The Supreme Court affirmed the decision of the trial court on the ground that a literal interpretation of the Code section would lead to absurd results, therefore, the court was not required to follow the statute. Three members of the court dissented on the ground that the legislature changed the common law rule of evidence prohibiting introduction of collateral sources and the dissenters argued that if the proper instructions were given to the jury as required by the statute, there would be no absurd result. The majority opinion remanded the case to the District Court for a proceeding in which it must be established that the proceeds of any recovery received by plaintiff are pledged to reimburse his worker's compensation insurer in accordance with Iowa Code §85.22. The opinion of the court assumes that there is a right of subrogation but the affirmance of the trial court is conditioned upon a determination by the trial court that plaintiff's recovery is in fact "pledged" to reimburse the worker's compensation insurer.

The language of §668.14 refers only to medical care, rehabilitation services and custodial care. There was no indication as to whether the worker's compensation benefits in the Schonberger case involved weekly benefits but the opinion does indicate that plaintiff was off work for three and a half weeks, therefore, it can be assumed that part of the worker's compensation lien was for weekly benefits. Technically the language of the Code would not include weekly benefits, however, this was not discussed in the opinion.

The majority opinion directs the trial court to conduct a "proceeding in which it must be established that the proceeds of any recovery received by Schonberger are pledged to reimburse his worker's compensation insurer in accordance with Iowa Code §85.22." The opinion does not indicate whether such proceeding is a matter for the court or the jury. However, it seems to be clear that the Supreme Court has determined that evidence of the receipt of worker's compensation benefits cannot be introduced into evidence.

The Schonberger case does not seem to prohibit evidence of receipt of collateral sources (other than those from government programs or purchased with funds of the claimant or claimant's immediate family) other than worker's compensation.

It would be very difficult to administer this rule in a trial. If there was a dispute as to subrogation rights, a court would

either have to determine subrogation rights as a matter of law or determine what evidence would be admissible on that issue and then draft instructions to the jury on subrogation rights and a special verdict on that issue. In addition, the Code section directs the court to use special interrogatories in which the jury "shall make findings indicating the effect of such evidence or argument on the verdict." This language seems to intend that the jury indicate what it did with the evidence and arguments but it seems impossible to draft an instruction and special verdict to carry out this direction. The difficulty in administering the language of §668.14 may be an important, but unstated, reason for rejecting the evidence.

XVI. JUDICIAL CONTROL OF FACT FINDING BY TRIAL COURT.

A. SPECIAL VERDICTS. Iowa Code §668.3(2,8) requires the trial court to use special verdicts in submitting a case to a jury.

B. INCONSISTENT VERDICTS. Iowa Code §668.3(6) states that the court shall not discharge a jury until the court has determined that the verdict or verdicts are consistent "with the total damages and percentages of fault" and requires the court to resubmit matters to the jury if there are inconsistencies.

In Cowan v. Flannery, 461 N.W.2d 155 (Iowa 1990) a jury, in an intersection accident, attributed 30% fault to plaintiff, 70% to defendant and 3% reduction for failure to wear a seat belt. The jury awarded $4,000.00 for past medicals and $17,220.00 for future medicals, but awarded nothing for past or future pain and suffering or other items of damage. The Supreme Court held that the award of medicals was supported by the evidence and held that the trial court should not have discharged the jury because of the inconsistence between the award of medical expenses and the lack of any award for past or future pain and suffering and the Supreme Court held that the trial court abused its discretion in failing to grant a new trial.

XVII. APPELLATE REVIEW.

A. SPECIAL VERDICTS.

In Cowan v. Flannery, 461 N.W.2d 155 (Iowa 1990) the court reviews decisions relating to adequacy of damages and points out that each case must be evaluated based on the facts in that case. In the Cowan case, the Supreme

Court concluded that failure of the jury to make an award for pain and suffering was unsupported by evidence and was also inconsistent with its award of a total of $21,220.00 for past and future medical expenses.

B. REVIEW OF PERCENTAGES OF FAULT.

Cook v. State, 431 N.W.2d 800 (Iowa 1988) was tried to the court without a jury. A driver sued the state for alleged negligence in placement of "stop ahead" signs at an intersection where the plaintiff driver collided with a vehicle coming from the driver's right. The trial court allocated fault 10% to the driver and 90% to the state. The court stated that the finding of fact is supported by substantial evidence if the finding "may be reasonably inferred from the evidence", and may become a question of law when the undisputed evidence and physical facts are such that all reasonable minds can reach only one conclusion. The Supreme Court applied the substantial evidence rule in reviewing the apportionment of fault. Findings are supported by substantial evidence "when a reasonable mind would accept it as adequate to reach a conclusion." The Supreme Court analyzed the decision of the trial court and compared the relative number of lines in the trial court decision dealing with fault of the state as compared with the comparative fault of the plaintiff and held that the trial court erred as a matter of law in failing to conclude that the plaintiff was negligent in failing to stop at a stop sign and yield the right-of-way. In addition, the court noted the trial court's failure to make a specific finding as to whether plaintiff was intoxicated or violated other rules of the road and the lack of such specific findings "passed a cloud of doubt on the court's allocation of fault." The majority opinion reversed because the trial court did not consider failure to stop at the stop sign in its determination of allocation of fault. Three justices dissented because they concluded that there was no showing that the trial court's "judgment was manifestly erroneous or the product of passion or prejudice . . ."

C. SCOPE OF RETRIAL.

In Rinkleff v. Knox, 375 N.W.2d 262 (Iowa 1985) plaintiff, who had been injured in a fall from a scaffold, was suing the lessor of the scaffold. The jury allocated 90% of the fault to the plaintiff. The Supreme Court reversed because of errors in instructions relating to both fault of defendant and the plaintiff. The

majority opinion ordered a retrial of all issues except the amount of damages. Justice Wolle dissented because he thought the new trial should not be limited to the issue of damages. Justice Wolle argued that "the issues of liability are closely related to, and intertwined with, the damage issues."

In Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988) the court held that in connection with the consortium claim, it was error to include the spouse of the consortium claimant in the allocations of fault and that a new trial was required. However, the court held it was not necessary to retry the issue of the amount of damages for loss of consortium. 430 N.W.2d at 104.

In the Cowan case, 461 N.W.2d at 160, the court reversed for failure of the jury to make any award for pain and suffering. However, the court held there was no error in any of the findings relating to liability or percent of fault, therefore, the case was reversed and remanded for a new trial upon the issue of damages only.

D. JURY CONFUSION. The Eighth Circuit held in Karl v. Burlington N.R. Co. (1989, CA 8 Iowa) 880 F.2d 68, 74 held that it was error for the trial court to reduce the figure inserted by the jury for actual damages based on statements of the jurors that the damage figure was intended to be a net figure rather than a gross figure as indicated by the verdict. The court held that receiving such statements violates Rule of Evidence 606(b) because the testimony relates to how the jury interpreted the court's instructions and concerned the jurors' mental processes, which is forbidden by the rule.

XVIII. JOINT AND SEVERAL LIABILITY.

Section 668.4 provides that the rule of joint and several liability shall not apply to a defendant who is found to bear less than 50% of the total fault assigned to all parties.

A decision as to whether joint and several liability applies is based upon the percentage of fault allocated by the jury or trial court. If a defendant's percentage is less than 50%, that defendant owes only an amount equal to the damage award multiplied by the percentage of fault assigned to that defendant. Copsas v. Iowa Gr. Lakes Sanitary Dist., 407 N.W.2d 339 (Iowa 1987).

In Schwennen v. Abell, 430 N.W.2d 98, 105, 106 (Iowa 1988) three members of the court dissented from the portion of the opinion by the majority which held that defendants must assume the percent of fault assigned to the consortium claimant's spouse, even though the fault of each defendant is less than 50%. In the Schwennen case the jury assigned 63% fault to the consortium claimant's spouse. Therefore, the dissenters argued that the holding of the majority is contrary to Iowa Code §668.4 which applies joint and several liability only to a defendant who is found to bear 50% or more of the total fault assigned to all parties.

Christopherson v. Deere filed August 12, 1991, (8th Cir. 1991) ____ F.2d _____ holds that a defendant who has been assessed 50% of the total fault does not have any joint and several liability for the percent of fault assigned to a third party defendant in a situation where the plaintiff has not made any claim against the third party defendant and the fault of the third party defendant involves breach of a duty to the claimant.

XIX. INTEREST.

Iowa Code §668.13 relating to interest on judgments was added in 1987. The code section relates to "actions brought pursuant to this chapter", therefore, it would seem to apply only when a jury is given two lines or more on which to make an allocation of fault. When comparative fault applies, §668.13 provides that interest on future damages commences with the entry of the judgment and interest on remaining damages accrues from the commencement of the action. The interest rate in comparative fault actions is tied to the yield on certain treasury bills and as of July, 1991, the interest rate was 6.26%.

If comparative fault does not apply, §535.3 applies, and interest is allowed on the entire verdict from the commencement of the action at 10%.

The court does not have authority to suspend the accrual of prejudgment interest as a condition for granting a continuance. In Mermigis v. Service Master Industries, Inc., 437 N.W.2d 242, 248 (Iowa 1989) the District Court agreed with the defendant that granting plaintiff a continuance past a Rule 215.1 deadline unjustly penalized a defendant who was ready for trial. However, the Supreme Court reversed and held that the discretion of the trial court was limited to either granting or denying a request for continuance. The court also held that prejudgment interest is not a "cost" but is an

element of plaintiff's recovery. See Baculis, 430 N.W.2d at 401.

Since consortium claims are not subject to comparative fault, the consortium claimant is entitled to 10% interest from the date of filing a lawsuit. This procedure was followed in the Schwennen v. Abell opinion filed in June (Iowa 1991) _____ N.W.2d ____ and was not challenged on appeal. The Schwennen case was tried twice. After the first trial, one of the defendants tendered into the District Court a partial satisfaction of judgment, expressly reserving the right to appeal pursuant to the case of Starke v. Horak, 260 N.W.2d 406, 407-08 (Iowa 1977). On retrial of the case, the defendant was found to owe less money and thereafter filed a post judgment motion seeking a refund. The court held that a post judgment motion was a proper method of raising the issue and pursuant to the Restatement of Restitution, §74, the defendant was entitled to judgment for the excess with interest at 10% from the date the post judgment motion was filed.

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XX. ALLOCATION OF COURT COSTS.

The trial court is given discretion in Iowa Code §625.3 to make an equitable apportionment of costs in comparative fault cases. In Woody v. Machin, 380 N.W.2d 727 (Iowa 1986) the trial court taxed the costs in using the same percentages assigned by the jury in its allocation of fault.

The District Court has broad discretion, however. In Lake v. Schaffnit, 406 N.W.2d 437, 442 (Iowa 1987) the trial court was affirmed in a case in which it taxed all of the costs to the defendant even though the jury has assigned 49% of the fault to the plaintiff.

XXI. PRODUCTS.

A statutory state of the art defense was adopted by the legislature in §668.12, effective June 8, 1986. This code section provides a defense if the manufacturer pleads and proves that the product conformed to the state of the art in existence at the time the product was produced.

This code section was before the court in Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 921 (Iowa 1990). The court held that the state of the art defense is a complete defense, however, "liability still exists in a case of a defect that is unreasonably dangerous and that a defendant learns of later.

XXII. GOVERNMENTAL IMMUNITY.

A. IMMUNITY GRANTED. Iowa Code §668.10 gives governmental immunity in the following situations:

1. Failure to install traffic control devices or other regulatory signs, however, failure to maintain a device that has been erected does result in liability.

2. Failure to remove or treat snow or ice if there has been compliance with the state or municipality policy or level of service.

3. For contribution unless notice has been given.

B. EFFECTIVE DATE. Cases filed on or after 7-1-84. Hershberger v. Buena Vista County, 391 N.W.2d 217, 219 (Iowa 1986). The following are included within the definition of traffic control devices:

1. Deer crossing sign. Netier v. Cooper Transp. Co., 378 N.W.2d 907 (Iowa 1985).

2. Rumble strips. Prell v. Wood, 386 N.W.2d 89 (Iowa 1986).

3. Railroad crossing gate arms and flashing lights. Herrington v. Chicago & Northwestern Transp. Co., 452 N.W.2d 614 (Iowa Appl. 1989).

4. Painting the edge of the road with reflective paint. Hershberger, supra.

5. Barricades for road construction. Foster v. City of Council Bluffs, 456 N.W.2d 1 (Iowa 1990).

C. IMMUNE ACTIVITIES.

1. Decisions relating to placement of road signs so long as the sign does not mislead or endanger the driver. The decision as to whether or where to replace, remove or change a sign is not a matter of maintenance for which liability extends. Saunders v. Dallas County, 420 N.W.2d 468 (Iowa 1988).

2. A city is immune from negligent failure to erect a sign even though the municipality created the dangerous condition for which the sign was

allegedly needed. Foster v. City of Council Bluffs, 456 N.W.2d 1 (Iowa 1990).

3. Immunity is not lost by reason of complaints concerning the sufficiency of the sign selection and placement to warn the public. Complaints as to sign selection and placement go only to their "sufficiency" to warn the public and this is a matter for which the government has immunity. The government is only liable for misleading signs. Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991).

D. STANDARD OF CARE.

The test is whether the installing of a warning sign was done in a negligent manner. Hershberger, supra. The governmental agency has a duty to avoid misleading or endangering drivers. Phillips, supra. There is a reference of the possibility that ordinary care would require a warning by other than inanimate devices. Hershberger, supra.

E. JURY INSTRUCTIONS.

Chapter 2900 of the Iowa Civil Jury Instructions covers governmental liability including both municipal and state tort liability. The instructions on duty to maintain were revised in June, 1991.

XXIII. INSURANCE PRACTICE.

Section 668.9 provides that it shall be an unfair trade practice, as defined in Chapter 507B, if an insurer assigns a percentage of fault to a claimant, for the purpose of reducing a settlement, when there exists no reasonable evidence upon which the assigned percentage of fault could be based. Section 668.9 states the prohibitions and sanctions of Chapter 507B shall apply to violations of this section. The Supreme Court had earlier held in Seeman v. Liberty Mutual Insurance Company, 322 N.W.2d 35.

In Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 259, 260 (Iowa 1991) the court reaffirmed its position that no private cause of action is authorized by §668.9. The Bates case arose out of a situation where Allied's insured driver and passenger had contended that they had the green light. During a bench trial involving a claim by the other driver, the defense attorney for Allied was told by the passenger that he had lied

about the light being green. The defense attorney then negotiated a settlement for less than the policy limits. The defense attorney then withdrew from the case. Meanwhile, plaintiff's attorneys learned of the perjured testimony. The new attorney for Allied then negotiated the settlement for the full policy limits and thereafter the plaintiff sued Allied and its original defense attorney alleging bad faith, unfair trade practices, fraud and intentional infliction of emotional distress. A summary judgment for defendants was affirmed on appeal.

XXIV. SEX ABUSE.

Section 668.15 was added in 1990 dealing with evidence in claims resulting from sex abuse. (1) provides that in order to obtain discovery of plaintiff's sexual conduct with persons other than the defendant, specific facts must be established showing good cause for discovery, etc. (2) provides that evidence concerning past sexual behavior of the alleged victim is not admissible.

XXV. SETTLEMENTS.

A. Consider the possibility of separate settlement by a co-defendant.

1. A co-defendant may settle out separately after pleadings are closed. A co-defendant may be dismissed from the suit by reason of settlement and the court may refuse to allow the filing of a third party petition on the ground of lack of timeliness. See Reese v. Werts Corp., 379 N.W.2d 1, 5 (Iowa 1985). A proposed amendment seeking contribution may also be refused on grounds of unfair prejudice to a plaintiff. See Lake v. Schaffnit, 406 N.W.2d 437, 440, 441 (Iowa 1987). If you suspect the possibility of a separate settlement with a co-defendant, it would be advisable to depose the plaintiff while the co-defendant is still a party and while the plaintiff has incentive to offer testimony indicating fault on the part of the co-defendant.

2. Where there are multiple defendants, consider serving an interrogatory and request for production on plaintiff asking if plaintiff has received any money on the claims set out in the pleadings and ask for production of a copy of any release or other document signed by plaintiff in connection

with the receipt of money. If plaintiff has settled, you will need to be able to prove the settlement at trial in order to have a basis for assigning fault to a released party. The serving of an interrogatory and request for production will give you a basis for arguing that plaintiff would have a duty to supplement the response pursuant to Rule of Civil Procedure 122(d). Burns v. Rodriquez, 448 N.W.2d 673 (Iowa App. 1989) authorizes such discovery.

3. Protection against separate settlements.

A partial settlement with one defendant after the pleadings have closed or even during trial, may leave the remaining defendants without any pleadings sufficient to justify requiring the jury to allocate fault to the settling party. Therefore, where there is more than one defendant, a defendant should consider:

a. Filing a cross claim for contribution; or

b. Reaching an agreement among the defendants that they either will not settle separately or, if so, will give sufficient notice to allow a cross claim to be filed (however, this would not give protection if the settlement occurred after pleadings closed and the court refused to allow the filing of a cross claim); or

c. Reaching an agreement among the defendants that they will not settle separately and either agree in advance as to their respective shares regardless of the outcome of the trial or an agreement that their contribution claims will be decided upon motion after the trial.

B. Plaintiff absorbs the percent of fault assigned to a party released by plaintiff.

The plaintiff's recovery against non-settling defendants is reduced by the percentage of fault allocated to settling defendants. This is called the proportion credit rule. This means that settling plaintiffs may recover more than the amount of damages ultimately determined, but they also may recover less. Plaintiffs bear the risk of poor settlements and the court says that

logic and equity dictate that they benefit from good settlements. Thomas v. Solberg, 442 N.W.2d 73, 76, 77 (Iowa 1989). See also Kopsas v. Iowa Gr. Lakes Sanitary Dist., 407 N.W.2d 339 (Iowa 1987) and Lenihan v. St. Albert Schools, 446 N.W.2d 289 (Iowa 1989).

C. A co-defendant may drop out of a case for reasons other than settlement. For example, a defendant may be dismissed from the suit by reason of death of a defendant and failure to file a claim with the estate. See Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985). A defendant may be dropped from a suit for other grounds such as sanctions for failure to respond to discovery. See Baldwin, 372 N.W.2d 490. These are additional reasons for the advisability of filing a cross claim for contribution against a co-defendant in order to make certain that you preserve your rights to have fault allocated to that party. Likewise, a party may be dismissed out of a case without paying any money or without being a party to a release. See Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 922, 923, where a wife, who had received bodily injury, settled with another party and, as a condition of settlement, required that the settling party's complaint against the husband of the injured plaintiff be dismissed. Because the husband was not a party to the release, the court held that §668.7 did not apply and fault could not be assigned to the husband. The court also added that the failure of the remaining party to file a third party action against the husband "is not in line with the underlying reason behind our strict interpretation of §668.2." 457 N.W.2d at 923.

D. Allocation of fault to a released party.

If a plaintiff has given a release to another party, the practical effect is a realignment of parties. The remaining defendants become plaintiffs in pleading, producing evidence, and arguing fault of the settling party. Plaintiff in effect becomes the real party in interest in defending the released party. A defendant who seeks to have fault allocated to a released party must prove the following:

1. Settler was liable to plaintiff because negligence of settler was a proximate cause. Common liability is required. Thompson v. Stearns Chemical Corp., 345 N.W.2d 131, 136 (Iowa 1984); Allied Mut. Ins.

Co. v. State, _____ N.W.2d _____ (Iowa, July 1991).

2. The same damages were recoverable under each of the claims. Knauss v. City of Des Moines, 357 N.W.2d 573, 578 (Iowa 1984). Compare Howell v. River Products Co., 379d 919, 922 (Iowa 1986), where defendants, operating independently, caused separate damage, limited in time. Restatement 2d §§433A, 433B.

3. The liability of a settler is on the same indivisible harm as the claim against defendant. Hunt v. Enzen, 252 N.W.2d 445, 448 (Iowa 1977). Restatement 2d §443A, §881.

4. The plaintiff gave settler a release, covenant not to sue or similar agreement. Fell v. Kewanee Farm Equipment Co., 457 N.W.2d 911, 922, 923 (Iowa 1990); Britt-Tech v. American Magnetics, 463 N.W.2d 26 (Iowa 1990).

5.* The amount received in settlement. Jones v. City of Des Moines, 355 N.W.2d 49 (Iowa 1984).

*Not relevant if Chapter 668 applies.

6. Fault of the settler should be determined by the trier of fact.

7. The claim of the plaintiff should be reduced by the percent of fault attributable to the settler if Chapter 668 applies; otherwise, the reduction should be the amount received in the settlement.

E. Considerations if you are a settling party.

1. If you obtain a release, covenant not to sue, or similar agreement, you are discharged from all liability for contribution by reason of §668.7. Therefore, it is not necessary to use a Pierringer release, since §668.7 gives protection from contribution claims.

2. Indemnity claims are not discharged. However, the ground of indemnity commonly known as active-passive negligence has been abolished in favor of comparative fault. American Trust & Sav. v. U.S. Fidelity, 439 N.W.2d 188, 190 (Iowa 1989).

3. If you are making a settlement and want to preserve a contribution claim against someone else, you must specifically name that party as a party being released, in order to make a contribution claim. See Britt-Tech v. American Magnetics, 463 N.W.2d 26, 29 (Iowa 1990).

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4. If more than one defendant is making a payment to the plaintiff, consider getting a mutual release among the defendants in which all defendants waive contribution claims.

5. Obligations for court costs must be clearly specified. It is no longer sufficient to use the term "taxable costs". Depositions are only taxable as costs if a part of the deposition has been introduced into evidence. Woody v. Machin, 380 N.W.2d 727 (Iowa 1986). A trial court lacks jurisdiction to tax discovery costs in an action dismissed before trial. Schark v. Gorski, 421 N.W.2d 527 (Iowa 1988). Therefore, a settlement agreement must clearly specify who is to pay court costs and what deposition costs, if any, are to be included in any agreement to pay costs.

6. Connie Alt prepared an excellent outline on "Releases from the Defense Point of View" for the 1990 Iowa Defense Counsel Seminar. A revised copy of her checklist is attached to this outline as pages 55 through 57.

F. What a jury is told about settlement.

In Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988) the Supreme Court ordered a new trial as to Mary Abell's consortium claim because her husband was included in the list of parties to whom the jury allocated fault. The court was remanded with directions to retry the claim for the purpose of establishing the proper apportionment of causal fault between two remaining defendants and since one of those defendants, Floyd County, had settled and had been released, that party was treated as a released party under §668.2(3). After a retrial, the case was again appealed to the Supreme Court, Schwennen v. Abell, _____ N.W. _____ (Iowa, June 1991). In the second appeal, the plaintiff claimed it was error to tell the jury the dollar amount of the jury award in the first trial and the fact that Floyd County had settled. The Supreme Court held that attorneys are permitted to

explain to the jury the effect of their answers and it was, therefore, proper for the court to tell the jury the dollar amount involved and to tell the jury that the status of Floyd County was as a released party, which was also necessary because of its conspicuous absence from the trial. The jury was not told the amount of the settlement. The Supreme Court held that this procedure was proper. A similar procedure had been followed before the adoption of Chapter 668 in Wadle v. Jones, 312 N.W.2d 510 (Iowa 1941).

XXVI. RELEASES.

A. EFFECT OF RELEASE.

Section 668.7 provides that a release discharges the released person from all liability for contribution "but it does not discharge any other person liable upon the same claim unless it so provides." The code section also provides that the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, as determined in accordance with §668.3(4).

B. SPECIFIC IDENTITY OF RELEASED PERSONS IS REQUIRED.

Aid Insurance Co. v. Davis County, 426 N.W.2d 631 (Iowa 1988) interpreted §668.7 to require "specific identification" of the persons to be released. The court added that the easier course would require naming those parties but at least some designation such as "employers", "partners", or "officers" would be required even though this rule might require evidentiary hearings to determine the members of the class. The court specifically held that a general designation such as "any other person, firm or corporation" would not sufficiently identify the tortfeasors to be discharged.

Britt-Tech v. American Magnetics, 463 N.W.2d 26 (Iowa 1990) applied the same rule even though the release was drawn before the Aid Insurance Co. case.

C. PRESERVING CONTRIBUTION CLAIMS.

If you make a settlement and want to preserve the right to make a contribution claim against someone to recover part of the money you paid in settlement, it is necessary that the persons you intend to make a claim against be specifically named in the release as being released by

the claimant. Section 668.5(2) states that contribution is available only if the liability of the person against whom contribution is sought has been extinguished.

1. Since contribution can only be recovered if the amount paid in settlement was reasonable (§668.5(2)), you may want to consider adding language in the release setting out the facts and the contentions in order to show that the amount paid in settlement was in fact reasonable.

D. SPECIFIC IDENTITY OF RELEASED CLAIM REQUIRED.

Vern R. Houghton Ins. v. Orr Drywall, 470 N.W.2d 39 (Iowa 1991) points out that separate and distinct claims may co-exist at the time a release is entered into and there is no presumption that all claims asserted, or to be asserted by, a party are subject to the terms of a release in the absence of clear language to the contrary. In the Orr Drywall case the insurer disputed the claim of the insured that notice had been given of a collision loss. The parties could not agree on a loss amount and the claim was submitted to arbitration and thereafter in return for a settlement check, the insured executed a policy holder's release which acknowledged that the sum being paid was "in full settlement and discharge of any and all amounts due to the undersigned under Policy No. CC552006 on account of a collision loss which occurred on or about the 7th day of October, 1986, at or near West Des Moines, Iowa". Thereafter, the insured sued for breach of contract, breach of fiduciary duties for untimely delays in processing and filed an action against the agent and agency for bad faith delay in processing the claim. The Supreme Court held that the decision as to whether the bad faith tort claim was precluded by the release depended on whether the claims arose out of the same facts. The Supreme Court held that it could not conclude as a matter of law that they did and that the question was, therefore, one for the trier of fact. The Supreme Court held that the District Court correctly concluded that the agency and the agent, as agents of the insurer, were released to the same extent as the insurer was released through the execution of the release. When an insurer obtains a release from its insured, perhaps the release should include language in which the insured releases the insurer from any claims arising out of the processing of the insured's claim.

See also discussion of Sweet v. Allstate Insurance Co. in paragraph F below.

E. PUNITIVE DAMAGES.

Contribution cannot be obtained for any portion of a settlement representing payment of punitive damages. Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990). Therefore, you may want to include language in the release either specifying that no part of the consideration represents payment on a claim for punitive damages or setting out the specific amount of the consideration for the punitive damages. Otherwise, the Reimers case requires a trial or other appropriate proceeding to determine the portion of the settlement relating to punitive damages and the party seeking contribution has the burden to show what portion of the settlement was for punitive damages if it appears that claims for punitive damages were included in the settlement.

F. INTERPRETATION OF RELEASES.

In Sweet v. Allstate _____ N.W.2d _____ (Iowa 1991), W.L. 108299, the defendant, UIM insurer, made a payment of $40,000.00 under its UIM coverage to the parents of the named insured who was killed in an auto accident. No personal representative had been appointed, therefore, there was no court approval. Settlement was made directly with the heirs of decedent. Thereafter, the father was appointed administrator and sued Allstate on behalf of the estate. Allstate filed a Motion for Summary Judgment based on the release. The Supreme Court held that where there are no debts and all beneficiaries agree, a settlement and distribution can be made without appointment of an administrator. However, the Supreme Court held that "given the contrasting possibilities which are presented by the circumstances, we conclude that the proper interpretation of the release in the present case presents an issue of fact rather than an issue of law." The parents contended that they intended only to release their own claims and did not intend to release the claims of the estate. Allstate argued that the case of Ruden v. Parker, 462 N.W.2d 674, 675 (Iowa 1990) held that Iowa does not recognize parental recovery for loss of services or support on the death of an adult child, therefore, the parents had no individual claims. However, the Supreme Court said "claims which in fact have no basis in law may nevertheless be asserted and

settled." The court adopted the following language from Comment b of Restatement (Second) of Contracts §212:

> "It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties."

The Sweet case shows the need to clearly state in the release the claims that are intended to be released. The case illustrates how easy it is to create a situation in which the court will hold that an issue of fact is presented rather than an issue of law. If the interpretation becomes an issue of fact, the language in the quotation from the Restatement constitutes a checklist of the type of evidence that would be admissible in interpreting a release.

However, in Britt-Tech v. American Magnetics, 463 N.W.2d 26 (Iowa 1990) a manufacturer who had settled a wrongful death claim was not allowed to offer extrinsic evidence to establish that the manufacturer and the claimant, in executing the release, intended to discharge the dealer, that sold the product to the claimant, and supplier of a component part which malfunctioned causing damages, where the release only stated that the claimant released all other persons, firms or corporations, known and unknown, and did not otherwise sufficiently identify the dealer or supplier. The Supreme Court said that they "join with the trial court in sympathizing" with the manufacturer, however, the Supreme Court pointed out that the trial court's ruling showed that the manufacturer could have cross-petitioned against the dealer and component part manufacturer but, for strategic reasons, may have decided to have decided to defend the loan.

XXVII. CONTRIBUTION.

Prior to 1984, there were no statutes relating to contribution. In the adoption of Chapter 668 in 1984, §668.5

provides for right of contribution and §668.6 provides for enforcement of contribution.

A. COMMON LIABILITY IS REQUIRED.

Section 668.5(1) provides a right of contribution where two or more persons are liable on the same indivisible claim for the same injury, death or harm, based on a person's equitable share of the obligations, including the share of fault of a claimant, as determined in accordance with Chapter 668. Therefore, contribution cannot be obtained if the person from whom it is sought has a special defense against an action by the injured party. Rees v. Dallas County, 372 N.W.2d 503, 505 (Iowa 1985); McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986); Mermigis v. Service Master Industries, Inc., 437 N.W.2d 242, 247 (Iowa 1989); and Allied Mutual Insurance Company v. State, _____ N.W.2d _____ (Iowa, July 1991) W.L. 130239. Typical special defenses include an employer's defense that workers' compensation is the exclusive remedy of the employee, inter-family immunity, and spousal immunity from a consortium action by a deprived spouse. See a list of examples set out in the Allied Mutual case.

B. CONTRIBUTION CANNOT BE OBTAINED FOR PUNITIVE DAMAGES.

Contribution was first adopted in Iowa in the case of Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (Iowa 1956) as a concept of "equitable contribution". In Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 170 (Iowa 1984) the court referred to the equitable underpinnings of the doctrine of contribution and held that Aquaslide's recklessness was of sufficient culpability to disqualify it from contribution. The court quotes at length from Restatement (Second) of Torts §886A, Comments j and k (1979) relating to intentional and reckless tortfeasors. However, the Restatement states that if a court interprets "willful" or "wanton" misconduct as no more than a high degree of ordinary negligence and without the mental element of deliberate and conscience, it does not follow that contribution is necessarily to be denied in the particular case. In Reimers v. Honeywell, Inc., 457 N.W.2d 336 (Iowa 1990) the court considered whether contribution could be obtained for punitive damages. The court points out that Chapter 668 applies comparative fault to "acts or omissions that are in any measure negligent or reckless." However, the Iowa Supreme Court had previously ruled in Godbersen v. Miller, 439 N.W.2d

206 (Iowa 1989) that Chapter 668 has no application to a claim for punitive damages and, therefore, a punitive damage award could not be reduced by fault allocated to a plaintiff. Since punitive damages lie outside the sweep of comparative fault, the court held that there can be no contribution claim for punitive damages.

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C. THE PERSON CLAIMING CONTRIBUTION MUST HAVE OBTAINED A DISCHARGE OF THE DEFENDANT.

A plaintiff who is seeking contribution must show that defendant's liability to the injured parties has been discharged and if it is based on a release, the defendant must be specifically named as being released. Aid Insurance Co. v. Davis County, 426 N.W.2d 631, 632-34 (Iowa 1988); Britt-Tech v. American Magnetics, 463 N.W.2d 26, 29 (Iowa 1990).

1. DISCOVERY. Releases and settlement documents are discoverable for the purpose of determining rights to contribution. Burns v. Rodriquez, 448 N.W.2d 673, 674 (Iowa App. 1989).

D. ENFORCEMENT OF CONTRIBUTION.

Section 668.6(1) allows collection of subrogation on motion or in a separate action if the percentages have been previously established by the court as provided in §668.3 and the party making the claim has paid more than its share of damages. Common liability must be established as a condition of contribution. American Trust & Sav. v. U.S. Fidelity, 439 N.W.2d 188 (Iowa 1989).

E. STATUTE OF LIMITATIONS.

If a judgment has been rendered, an action for contribution must be commenced within one year after the judgment becomes final. If judgment has not been rendered:

1. The person claiming contribution must have discharged the liability of the person from whom payment is sought by payment made within the period of the statute of limitations applicable to claimant's right of action and must have commenced the action for contribution within one year after the date of that payment, or

2. The person seeking contribution must have agreed, while the action of the claimant was pending, to discharge the liability of the person from whom contribution is sought and within one year after the date of the agreement, must have discharged that liability and commenced the action for contribution. Section 668.6(3); Insurance Co. of N. America v. Coast Catmaran, 753 F.Supp. 804 (S.D. Iowa 1991).

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XXVIII. INDEMNITY.

American Trust & Sav. v. U.S. Fidelity, 439 N.W.2d 188, 190 (Iowa 1989) abolished active/passive or primary/secondary as a ground for indemnity. Comments l and m to Restatement (Second) of the Law of Torts, §886B had earlier pointed out that contribution may gradually expand the situations covered by contribution at the expense of indemnity, or indemnity may absorb contribution. The American Trust opinion refers to a trend to replace indemnity in the area of secondary as opposed to primary liability with contribution and held that the doctrine of active/passive negligence does not fit within our statutory network of comparative fault. The remaining three grounds for indemnity are:

A. Express contracts.

B. Vicarious liability.

C. Breach of independent duty of the indemnitor to the indemnitee.

In Allied Mutual Insurance Company v. State, _____ N.W.2d _____ (Iowa, July 1991) W.L. 130239, Allied sought indemnity from a vehicle owner based on the owner's liability statute, §321.493, on the theory that it imposed an independent statutory duty on the owner. The court held that the general duty of an owner or an employer not to cause injury to another by one's negligent act is not sufficient to create a basis for indemnity.

The dissenters in Tigges v. City of Ames, 365 N.W.2d 503 contended that partial indemnity should be allowed on a claim of contractual indemnity based on comparative fault. The majority held that the issue was not presented to the District Court and could not be raised on appeal.

XXIX. RECUSAL.

Court Rule 119 adopts an Iowa Code of Judicial Conduct.

A. DISQUALIFICATION.

Rule D provides that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

1. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

2. The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

3. The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

4. The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

   a. Is a party to the proceeding, or an officer, director, or trustee of a party.

   b. Is acting as a lawyer in the proceeding.

   c. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

   d. Is to the judge's knowledge likely to be a material witness in the proceeding.

B. REMITTAL OF DISQUALIFICATION.

If a judge is disqualified because of a financial interest or a relationship as set out in paragraphs (c) or (d) above. The judge may make a disclosure on the record and if the parties and lawyers agree in writing, the judge may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

C. CONTEMPT OF COURT.

If a situation arises in court where the judge must act instantly to suppress a disturbance or violence or physical obstruction or disrespect of the court, which occurs in open court, the sitting judge may summarily enter an order for contempt without referring the matter to another judge. Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390 (1925). However, if the trial judge waits until the end of the trial before proceeding with the contempt citation, the judge is required to disqualify himself and refer the matter to another judge. Knox v. Municipal Court of City of Des Moines, 185 N.W.2d 705 (Iowa 1971). See also proceedings arising out of the Chicago 7 Anti-Riot Conspiracy trial. United States v. Seale (7th Cir. 1972) 461 F.2d 245; In Re Dillinger, 502 F.2d 815 (1974).

However, in the case of Matter of Frerichs, (Iowa 1976) 238 N.W.2d 764 the Iowa Supreme Court filed an original disciplinary proceeding against an attorney based on statements in a Brief the attorney filed in the Supreme Court. The Supreme Court issued a show cause order and tried the issue themselves instead of designating another court to try the matter or using the attorney disciplinary procedures of Rule 118. The court found that the attorney attributed to the Supreme Court "sinister, deceitful and unlawful motives and purposes". The court held that in view of the attorney's assurances as to his intent, there was no need to go further than an admonishment.

An article and note in 38 Drake Law Review discusses the relationship between ethical constraints to "maintain the respect due to courts" and the needs of attorneys for first amendment protection in criticizing judges. The U.S. Supreme Court has not ruled on the issue of whether attorneys have a constitutional right to criticize courts.

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400.9 UNREASONABLE ASSUMPTION OF RISK - DEFINITION. The defendant claims that plaintiff unreasonably assumed the risk by:

(Set out the particulars.)

To prove this defense, the defendant must prove all of the following propositions:

1. The plaintiff knew the risk was present.

2. The plaintiff understood the nature of the risk to [himself] [herself].

3. Nevertheless, the plaintiff unreasonably, freely and voluntarily took the risk.

4. The plaintiff's assumption of the risk was a proximate cause of plaintiff's damage.

If the defendant has failed to prove any of these propositions, the defendant has not proved this defense. If the defendant has proved all of these propositions, then you will assign a percentage of fault against the plaintiff and include it in the total percentage of fault, if any, found by you in your answers to the special verdicts.

Authority

Iowa Code section 668.1

Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 548 (Iowa 1980) (Court's emphasis)

Restatement (Second) of Torts, Section 496A, et. seq. Section 496G

Exhibit 30

6/91

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400.7 COMPARATIVE FAULT - MITIGATION OF PERSONAL INJURY DAMAGES. Defendant claims plaintiff was at fault by failing to exercise ordinary care to obtain reasonable medical treatment.

Evidence has been introduced that damages could have been reduced to some extent if (name) had obtained (medical treatment in issue). An injured person has no duty to undergo serious or speculative medical treatment, but, if by reasonable expense and by reasonable inconvenience, a person exercising ordinary care could have reduced the damages, [he] [she] has a duty to do so.

F

Authority

Iowa Code section 668.1

Shewry v. Heuer, 255 Iowa 147, 121 N.W.2d 529 (1963)

Updegraff v. City of Ottumwa, 210 Iowa 382, 226 N.W. 928 (1929)

White v. Chicago & N.W. Ry. Co., 145 Iowa 408, 124 N.W. 309 (1910)

Bailey v. City of Centerville, 108 Iowa 20, 78 N.W. 831 (1899)

Welter v. Humbolt County, 461 N.W.2d 335 (Iowa App. 1990)

Exhibit 29

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1000.1 ESSENTIALS FOR RECOVERY. In order to recover on the claim of strict liability, the plaintiff must prove all of the following propositions:

1. The defendant [designed] [manufactured] [assembled] [sold] (product).

2. The defendant was engaged in the business of [designing] [manufacturing] [assembling] [selling] (product).

3. The (product) was in a defective condition at the time it left defendant's control in one or more of the following ways:

   (Set out particulars as supported by the evidence.)

4. The defective condition was unreasonably dangerous to the plaintiff.

5. The plaintiff used the (product) in the intended manner or in a manner reasonably foreseeable by defendant.

6. The (product) was expected to and did reach the plaintiff without substantial change in its condition.

7. The defect was a proximate cause of plaintiff's damage.

8. The amount of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If the plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense* is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, then you will consider the defense of _____ as explained in Instruction No. _____.]

Authority

Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911 (Iowa 1990)

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980)

Exhibit 32

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Cooley v. Quick Supply Company, 221 N.W.2d 763 (Iowa 1974)

Kleve v. General Motors Corporation, 210 N.W.2d 568 (Iowa 1973)

Hawkeye Security Insurance Company v. Ford Motor Company, 199 N.W.2d 373 (Iowa 1972)

Hawkeye-Security Insurance Company v. Ford Motor Company, 174 N.W.2d 672 (Iowa 1970)

Comment

Note: *See Iowa Code section 668.12 for State of the Art Defense.

If there is a factual issue as to whether the plaintiff is a "user or consumer" within the law of products liability, this would present another essential to plaintiff's recovery. See: Restatement (Second) of Torts, 402A, comments l and o.

Caveat: The committee takes no position as to the burden of proof on the issue of misuse. The court must decide if proposition 5 belongs in the instruction. Cf. Hughes v. Magic Chef, Inc, 288 N.W.2d 542 (Iowa 1980), Iowa Code section 668.1, and Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911 (Iowa 1990).

1000.2 SELLER - DEFINITION. (Deleted)

Note: This was deleted because of the adoption of Iowa Code section 613.18.

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1000.3 DEFECTIVE CONDITION AND REASONABLY FORESEEABLE USE - DEFINITION. A product is defective if it does not perform reasonably, adequately and safely:

1. In the normal or specified use intended by the defendant.

2. When it is used in a manner reasonably foreseeable by the defendant. A reasonably foreseeable use is a use or misuse of a product a [designer] [manufacturer] [assembler] [seller] would expect of a reasonably prudent person who is likely to use the product under similar circumstances. In determining a reasonably foreseeable use you should consider the following matters as shown by the evidence:

   a. The reasonable use or uses of the product.

   b. The ordinary user's awareness that the use of the product in a certain way is dangerous.

   c. The likelihood of, and probable use of, the product by persons of limited knowledge.

   d. The normal environment for the use of the product and the foreseeable risks in such a place.

   e. Any other evidence bearing on this question.

A product is not necessarily defective if it fails because of natural deterioration resulting from use and lapse of time.

Authority

Henkel v. R and S Bottling Company, 323 N.W.2d 185 (Iowa 1982)

Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980)

Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980)

Restatement (Second) of Torts, section 402A, Comments g and h. (1965)

Comment

Note: Use 1 or 2 as may apply to the case.

Exhibit 34

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1000.4 UNREASONABLY DANGEROUS - DEFINITION. A defective product is unreasonably dangerous if:

1. The danger is greater than an ordinary consumer with knowledge of the product's characteristics would expect it to be.

2. The danger outweighs the utility of the product.

3. The benefits of the design do not outweigh the risks. In determining whether the design benefits outweigh the risks you may consider:

   a. The seriousness of the harm posed by the design.

   b. The likelihood that such danger would occur.

   c. The mechanical feasibility of a safer alternate design.

   d. The cost of an improved design.

   e. The adverse consequences to the product and the user that would result from an alternate design.

   f. Any other facts or circumstances shown by evidence having any bearing on the question.

Authority

Chown v. USM Corporation, 297 N.W.2d 218, 220, 221 (Iowa 1980)

Kleve v. General Motors Corporation, 210 N.W.2d 568 (Iowa 1973)

Restatement (Second) of Torts, section 402A, Comment i

Comment

Note: Use paragraphs 1, 2 or 3 as they apply to the case.

Paragraph 3 applies only to claims of defective design.

Exhibit 35

6/91

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1000.5 CHANGE IN CONDITION OF THE PRODUCT. The requirement that a product be free from defects at the time it left the defendant's control includes the requirement that there be [proper packaging] [necessary sterilization] precautions to keep the product free from defects for a normal length of time when handled in a normal manner.

However, the defendant is not responsible if the product is delivered free from defects and later mishandling, changes or other causes beyond their control make the product defective, unless mishandling, changes or other causes beyond defendant's control was reasonably foreseeable by the defendant.

F

Authority

Henkel v. R and S Bottling Company, 323 N.W.2d 185 (Iowa 1982)

Aller v. Rodgers Machinery Mfg. Co. Inc., 268 N.W.2d 830, (Iowa 1978)

Cooley v. Quick Supply Company, 221 N.W.2d 763 (Iowa 1974)

Restatement (Second) of Torts, section 402A, comment g, p (1965)

1000.6 DIRECTIONS OR WARNING. (Deleted.)

Comment

Note: This instruction has been deleted because the committee believes there is no Iowa authority to support the instruction. Compare Henkel v. R and S Bottling Company, 323 N.W.2d 185 (Iowa 1982) with Restatement (Second) of Torts, Section 402A, Comments h and j (1965)

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1000.9 ASSUMPTION OF RISK. The defendant claims the plaintiff voluntarily assumed the risk of:

(Set out the particulars supported by the evidence.)

To prove this defense, the defendant must prove each of the following propositions:

1. The plaintiff knew the [defect] [dangerous condition] was present.

2. The plaintiff understood the nature of the danger to [himself] [herself].

3. Nevertheless, the plaintiff unreasonably, freely and voluntarily used the product.

4. The plaintiff's assumption of risk was a proximate cause of plaintiff's damage.

If the defendant fails to prove any of these propositions, the defendant has not proved this defense. If the defendant has proved all of these propositions, then you will include this fault in the total percentage of plaintiff's fault you find in accordance with the special verdict submitted with these instructions.

Authority

Martin v. Heddinger, 373 N.W.2d 486 (Iowa 1985) (Elements of Assumption of Risk)

Gremmel v. Junnie's Lounge, Ltd., 397 N.W.2d 717 (Iowa 1986)

Williams v. Brown Manufacturing Co., 261 N.W.2d 305, 312 (Ill. 1970) Cited specifically in Hawkeye Security Insurance Company v. Ford Motor Company, 199 N.W.2d 373 (Iowa 1972)

See: Restatement (Second) of Torts, Section 496 A, B, C, D, E, F and G

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Comment

Caveat: Further case law clarification is necessary before submitting an instruction correlating the statutory provisions and prior case law in misuse of a products. Compare Iowa Code Section 668.2 with Hughes v. Magic Chef, Inc., 288 N.W.2d 542 (Iowa 1980)

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1000.10 AFFIRMATIVE DEFENSE - STATE OF THE ART. (Defendant) claims it complied with the state of the art.

"State of the art" is what feasibly could have been done. It means what technologically and practically could have been done at the time, based on the latest scientific knowledge and discoveries in the field, to [design] [manufacture] [produce] that would have prevented plaintiff's injuries while meeting the user's needs. Custom in the industry is not necessarily state of the art, nor is every [alternate design] [safety device] for which technology exists necessarily feasible.

To establish this defense, the defendant must prove its product conformed to the state of the art in existence at the time the product was [designed] [tested] [manufactured] [formulated] [packaged] [provided with a warning] [labeled].

Even if a product initially complies with the state of the art, a defendant has a continuing duty to warn users concerning product defects of which a defendant acquires knowledge after the product is [manufactured] [sold]. If a defendant later learns its product is defective or unreasonably dangerous, then the defendant has a duty to warn those it knows or should know will be affected by its use.

If a defendant proves its product conformed to the state of the art [and complied with the continuing duty to warn users], then the defendant is not at fault and [you cannot assign any fault to that defendant in the verdict] [your answer to interrogatory number _____ will be "no"].*

If the defendant fails to prove its product conformed to the state of the art, you will consider whether the plaintiff is entitled to recover under the other instructions.

Authority

Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911, 921 (Iowa 1990)

Chown v. USM Corporation, 297 N.W.2d 218, 221-22 (Iowa 1980)

Iowa Code section 668.12

Comment

Note: The paragraph on subsequently acquired knowledge may be deleted if that is not an issue.

Exhibit 39

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*Consider submitting an interrogatory in the verdict form as to whether a defendant has proved state of the art. See Fell v. Kewanee Farm Equipment Company, 457 N.W.2d 911, 921-22.

Z. In handling a claim file you should keep in mind the possibility that bad faith will be claimed. By merely claiming bad faith in a pleading, a claimant is entitled to require production of claim files and correspondence between the insurer and its attorneys and depositions from claims personnel and attorneys. Henke v. Iowa Home Mutual Casualty Company (1958) 249 Iowa 614, 87 N.W.2d 920; Amsden v. Grinnell Mutual Reinsurance Co. (Iowa 1972) 203 N.W.2d 252; Miller v. Continental Ins. Co. 392 N.W.2d 500 (Iowa 1986); Handley v. Farm Bureau Mut. Ins. Co. 467 N.W.2d 247 (Iowa 1991). In order to protect against bad faith claims, it is advisable to keep the insured informed and include documentation in the file if you are waiting for the insured to furnish you information. When you make an evaluation you should document the reasons for the evaluation and likewise offers to pay claims should document reasons and also document any failures of the insured to furnish information that has been requested.

The following is a checklist of matters you should discuss at the time of settlement.

1. How the check should be made payable (plaintiff/attorney/lienholder);

2. Who will pay the court costs and what will the court costs include (depositions, etc.);

3. The complete name of the plaintiff or claimant, their spouse, and all children (including children's ages) and will plaintiff agree to release all claims;

4. Is plaintiff settling all claims or will he/she continue with suit against others [or does plaintiff have other potential claims not yet asserted against others];

5. Will defendant require an indemnity agreement;

6. Are there any hospital, medical or attorney liens or outstanding bills for health care practitioners and how will they be resolved;

7. Is there a worker's compensation lien and if so, how will it be resolved;

8. If one of the claimants is a minor, how will the settlement proceeds be allocated, and if the minor will receive over $4,000, who will prepare the conservatorship documents;

9. Does the plaintiff intend to pursue underinsurance, and if so do both parties understand the effect of the release;

10. Does defendant intend to pursue contribution against other tort-feasors or require an assignment;

11. If you plan to make a contribution claim:

    a. You must show that you obtained a release of the party against whom you are making a contribution claim;

    b. You should set out in the release sufficient facts and contentions to show that the amount being paid is reasonable;

    c. Include a statement in the release that because of insufficient evidence none of the consideration for the release represents payment of punitive damages;

12. If more than one party is making payments to a claimant, it is advisable to have a mutual release or exchange of letters indicating that no contribution claims will be made among the settling parties;

13. In settling first party claims:

    a. The insurer and its agents and employees should be released. See Vern R. Houghton Ins. v. Orr Drywall, 470 N.W.2d 39, 43 (Iowa 1991);

    b. It is not sufficient to merely release the insurer. The release should also release all claims relating to "processing and payment" of claims relating to the accident or incident. This language is necessary to release claims of bad faith relating to either failure to pay or delays in payment of claims. Vern R. Houghton Ins. v. Orr Drywall, 470 N.W.2d 39 (Iowa 1991);

14. Does either party request confidentiality or nondisclosure clause[1];

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[1]In Tratchel v. Essex Group Inc., 452 N.W.2d 171, 181 (Iowa 1990) the Court affirmed the enforcement of a nondisclosure stipulation regarding documents defendant produced through discovery.

THE SELECTION, CARE AND FEEDING OF EXPERTS AND THEIR DISMEMBERMENT

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I. WHEN DO YOU USE AN EXPERT?

A. Iowa Rule of Evidence 702 provides "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

II. WHERE DO YOU FIND EXPERTS?

A. Defense Research Institute.

B. Individuals serving on committees or participating in preparation of materials for organizations such as:

1. National Safety Council
   444 North Michigan Avenue
   Chicago, IL 60611
   312/527-4800

2. American National Standards Institute (ANSI)
   1430 Broadway
   New York, NY 10018
   212/354-3300

3. American Society of Testing and Materials (ASTM)
   1916 Race Street
   Philadelphia, PA 19103

4. Society of Automotive Engineers (SAE)
   400 Commonwealth
   Warrendale, PA 15096
   412/776-4841

C. In-house technical people, *i.e.*, engineers, product development people, financial officers.

D. University professors

E. Individuals who have gained expertise through experience, *i.e.*, mechanics, contractors, etc.

III. HIRING AN EXPERT WITNESS.

A. Make clear to the expert what his/her role will be in the litigation.

B. Have a full and candid discussion of the expert's fees for:

1. case review;

2. consultation;

3. deposition; and

4. trial testimony.

C. Obtain a commitment from the expert to devote the necessary time to your case. Ask the expert what his/her schedule is for the next six months. This will give you an idea as to the work load the expert witness has and how much time you can expect to have available for your case during that period.

D. Obtain copies of publications prepared by the expert and, to the extent possible, read them to find out whether the expert has taken positions int he past which are contrary to those which are going to be expressed in your case.

E. Obtain the names of some other lawyers for whom the expert has testified recently. Call those attorneys to obtain an assessment of the expert's performance as a member of the trial team and as a witness.

F. Obtain transcripts of depositions or trial testimony of the expert in other cases. These usually can be obtained from other attorneys who have retained the expert.

G. If you have discovery deadlines or a trial date, be sure the expert can meet the deadlines and can be present to testify at trial.

H. Obtain a commitment that the expert will not become engaged in a similar case and take a position in conflict with the one being taken in your case

I. Explain that written reports should be prepared only when requested.

IV. WHAT ARE THE CHARACTERISTICS OF A GOOD EXPERT WITNESS/

A. Believability.

B. Proper credentials, including training, background and experience in the specific area where the expert will be expressing opinions in your case.

C. An understanding of the limits of the areas of his/her expertise.

D. Preferably someone who is not a "professional witness" who devotes more than fifty per cent of his/her time to serving as a consultant for attorneys engaged in litigation. Avoid expert witnesses who advertise extensively in legal periodicals and those who maintain toll free numbers. That information usually comes out on cross-examination.

E. Someone who will tell you if, after examining all of the available information, their opinion is not favorable and will explain why Jurors can usually see through an expert witness who is merely expressing whatever opinions are necessary to generate a fee.

F. Someone who is willing to retreat from a previously taken position if necessary when presented with new or additional information.

V. HOW TO HELP THE EXPERT PREPARE TO FORMULATE OPINIONS IN THE CASE.

A. Provide <u>all</u> relevant information including:

1. depositions;
2. photographs;
3. physical evidence;
4. interrogatory answers;
5. product information;
6. medical records; and
7. accident reports.

B. Explain your theory of the case and why you believe expert testimony is an essential part of your case.

C. Explain your opponent's theory of the case and discuss what it is about your opponent's case that you want the expert to address i preparing and formulating opinions.

D. Keep the expert informed as the case progresses. As new information becomes available, provide it. Check with the expert from time-to-time to see how the preparation is proceeding.

E. REMEMBER - whatever information you provide to your expert witness may very well be subject to discovery and disclosure to your opponent. Experts are not protected by the attorney/client privilege. I.R.E.612 permits an adverse party to inspect any writing used by a witness to refresh his/her memory for the purpose of testifying under certain circumstances. There is no clear line as to whether information you provide to you expert must be disclosed in all situations. Compare: in Re Comair Disaster Litigation, 100 F.R.D.350(E.D.Ky.1983) with Bogosian v. Gulf Oil, 738 F.2d.587(3d.Cir.1984). For practical purposes, you should assume that anything provided to your expert witness will be examined by your opponent.

F. Identify "learned treatises" which your expert considers to be reliable. I.R.E.803(18) provides:

> "To the extent called to the attention of an expert witness upon cross-examination or relied upon by that witness to examination, statements contained in published treaties, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

VI. OBTAINING DISCOVERY FROM YOUR OPPONENT'S EXPERT.

A. Interrogatories. I.R.C.P. 125 sets forth a comprehensive method of obtaining discovery of experts. The first step should be an interrogatory tailored to obtain the information permitted by the Rule.

B. Deposing your opponent's expert. Too often, depositions of expert witnesses are taken when they are either not necessary or not desirable. Before taking your opponent's expert's deposition, you must determine whether you need the deposition to assist you in preparing for trial or in preparing your expert witness to testify. Among the things you should consider are the following:

1. has the expert prepared a comprehensive report from which you can cross-examine at trial? A good example of this are reports from economists who rely on statistical and factual data to support their opinions;

2. has the expert published widely in the field so that you are in a position to know what to expect and to cross-examine at trial?

3. will you be showing your hand and exposing your strategy to the opposing expert by taking the deposition?

4. is there a possibility that your discovery deposition of the opponent's expert will be used at trial instead of the expert being brought to testify? F.R.C.P. 32(a)(3) states:

> "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and

with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

Similarly, I.R.C.P.144 provides:

> "Any part of a deposition, so far as admissible under the rules of evidence, may be used upon the trial or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, either: (a) To impeach or contradict deponent's testimony as a witness; or (b) For any purpose if, when it was taken, deponent was a party adverse to the offeror, or was an officer, partner, or managing agent of any adverse party which is not a natural person; or (c) For any purpose, if the court finds that the offeror was unable to procure deponent's presence at the trial by subpoena; or that deponent is out of the state and such absence was not procured by the offeror; or that deponent is dead, or unable to testify because of age, illness, infirmity, or imprisonment; or (d) For any purpose, if it was taken of an expert witness specially retained for litigation; or the deponent was a health care practitioner offering opinions or facts concerning a party's physical or mental condition; and (e) On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

In *Farley v. Seiser*, 316 N.W.2d 857(Iowa 1982), the Supreme Court held that plaintiff in a medical malpractice action should have been allowed to read a discovery deposition taken of plaintiff's expert by defendant into evidence as part of plaintiff's case. The court specifically stated that the trial court had no discretion to exclude the deposition once plaintiff established the witness' unavailability.

VII. EFFECTIVE DEPOSITION OF THE ADVERSE EXPERT WITNESS.

A. Obtain the expert's credentials and list of publications and other testimony prior to the deposition. If you obtain this information, check through the publications and other testimony to try and find opinions that are inconsistent with those being expressed in this case. Carefully decide whether you want to bring these inconsistencies up at the deposition or whether you want to save them for trial.

B. Confer with your expert witness to find out what, if any, weaknesses your expert perceives in the adverse expert's opinions. Also, obtain from your expert a list of treatises and publication which are helpful to your case and which the other expert will probably agree are authoritative.

C. Do not use a "script" or question-by-question outline. One of the great advantages of an oral deposition is that it allows you to ask follow-up questions and to go into areas that may have been suggested by the witness' answer. If you have a script and follow it religiously, you will miss out on the most important advantages of an oral deposition.

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D. Prior to beginning the examination of the adverse expert, review the expert's entire file and, if appropriate, obtain a copy. Mark as exhibits any documents discussed with the expert and obtain identification of other documents not marked as exhibits which you may want to save for trial so that it is clear that those documents were in the expert's file at the time of the deposition.

E. Determine whether the expert has issued any written or oral reports or prepared any analysis which has not been provided to you. Also, find out if there are preliminary or intermediate drafts on any reports and, if available, examine them.

F. The expert witness should be asked to detail each and every opinion formulated in connection with the case. As to each opinion, all facts relied upon to formulate the opinion should be disclosed.

G. An important decision in every expert's deposition is whether or not to test the opinions or to point out how the information relied upon is unreliable or to show that there is other necessary information that has not been disclosed which might change the opinion. If it appears likely that the case will be tried, you should carefully weigh the advantages or disadvantages of giving the expert witness a "preview" of what will be brought out on cross-examination at trial to undermine the expert's credibility and opinions.

H. Obtain a commitment from the expert that everything that was necessary to be done was done prior to the formulation of the opinions expressed in the deposition and that no further work or investigation is necessary prior to trial. If the expert discloses that additional work is to be done or additional investigation is to be conducted, reserve the right to further depose the expert based upon the additional work or investigation.

I. Find out what percentage of the expert's work is devoted to litigation and obtain a breakdown as to what percentage is working for plaintiffs and what percentage is working for defendants.

J. Identify the "professional witness."

K Obtain the identity of any documents, records or other material which the expert has reviewed or consulted but which are not contained in the expert's file. Determine why those documents are not in the file and where they are located.

L. Determine if the expert has consulted with any other experts or had part of the work relied upon performed by others such as testing laboratories, etc.. Obtain all communication to or from such resources relied upon by the expert

VIII. PREPARING FOR THE DEPOSITION OF YOUR EXPERT.

A. Preparation for the deposition of your expert should begin at the time of initial consultation and retention. By the time the expert's deposition is to be taken, you will hopefully have provided everything necessary to permit the expert to confidently express opinions and not be surprised by other information or other material which is available but has not been provided. Prior to the day of the deposition (preferably the day before), you should meet with the expert and have a complete preparation session. Among the items to be reviewed should be the following:

1. A complete review of the expert's file. From time-to-time expert witnesses, like all of us, will misfile material. Something that is not a part of the file may be included within the materials It can be very embarrassing for the expert to explain why something

located in what is supposed to be the case file at issue actually belongs somewhere else. If there are items in the file which you claim are subject to the attorney/client privilege, they should be identified and put in a separate sub-file. At the time of the deposition, you must inform the opposing counsel of what has been removed and identify generally the nature of the documents and why they are not being produced so that an appropriate request can later be made by your opponent for production of the material.

2. Walk your expert through the type of examination you expect to be conducted. Obtain a complete recitation from your expert or every opinion to be expressed and every fact and every document relied upon. Test your expert before your opponent does.

3. If your expert has demeanor problems, point them out as gently and as diplomatically as possible but be sure to point them out. Your opponent's evaluation of your case will depend, to a certain extent, upon the evaluation of what kind of witness your expert will make.

4. If appropriate, be sure that the expert has been to the scene of the accident, observed all of the physical evidence, interviewed - or at least met - your client, etc.

5. If the expert is inexperienced and has not been subject to numerous prior depositions, fully explain the process and take the expert through the same steps you normally take lay witnesses through in preparing them for depositions. Never assume that your expert knows what is expected of a witness.

IX. PRESENTING EXPERT TESTIMONY AT TRIAL.

A. Qualify your expert. This should be done in five or ten minutes so that the jury realizes that your expert is someone who is qualified to speak on the subject matter. Too often,

30 minutes are spent having the witness explain every organization to which he/she belongs and identifying every paper that he/she has ever written and boring the jury in the process.

B. Have the expert explain the nature and extent of his/her investigation and evaluation. This also should be relatively brief. The jury should know that your expert is not merely expressing opinions without foundation. What you need to show is that the expert has looked into the matter sufficiently to be able to express an informed opinion.

C. Have the expert express the opinions formulated. Too often, lengthy recitation of all the factors considered precedes the rendition of the opinions. This takes away from the effectiveness of the witness' testimony and fails to highlight what should be the most important part. I.R.E. 705 provides:

> "The expert may testify in terms of opinion or inference and give reasons thereof without prior disclosure of the underlying facts or dates, unless the court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination."

D. Immediately after each opinion is expressed, ask the expert to give an explanation as to why he/she holds that opinion. Again, this should be relatively brief and for the purposes of allowing the jury to understand that there is a simple and logical reason why the expert has formulated the particular opinion.

E. Avoid scientific and technical terms. The expert must understand the difference between scientific and technical meetings and a jury trial. While fancy technical terms may impress the expert's peers, they only confuse laymen. Jurors are not impressed by fancy language. They are impressed by opinions that they can understand, follow, and accept.

F. Use demonstrations whenever possible. The most effective form of expert testimony is the witness who gets out of the witness box, comes down to the jury rail and shows the jurors why he/she has reached a particular conclusion. This can be done by using models,

physical evidence, photographs, video tapes, computer simulations and any other graphic evidence that will explain and simplify the expert's opinion.

X. CROSS-EXAMINING THE ADVERSE EXPERT AT TRIAL.

A. Keep it short. Lengthy cross-examination of your opponent's expert will seldom, if ever, be beneficial. You should know exactly what you intend to ask and have available all of the information and all of the exhibits you will be using with the expert before you begin the cross-examination. This included material such as prior testimony, publications, and treatises or other professional publications.

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B. Keep the reins tight. Do not allow your opponent's expert to use cross-examination as an opportunity to restate the previously expressed opinions and the basis for the opinions. You must control the examination and frame your questions in a way that elicits short answers.

C. Strike early. If you have material, information, or evidence which will discredit the expert and/or the expert's opinions, bring it out immediately. The expert is least comfortable at the start of cross-examination. The jurors are anxious to hear what, if anything, you have to contradict or impeach the expert.

D. Do not seek to have the adverse expert recant. There are few recorded instances of cross-examination of an adverse expert resulting in the expert recanting the previously expressed opinions and tearfully admitting on the witness stand that he/she was mistaken. The opposite is almost always true. Experts are loath to back down or in any way retreat from a position previously taken. You can turn this to your advantage if you can show that the position is unreasonable or if the expert refuses to make concessions which are logical or obvious.

E. Convince the jury that the expert is not credible. The jurors understand that all expert witnesses are paid for their services and would not be called to testify if their opinions were not favorable to the party paying their fee. If, through cross-examination, you can convince the

jury that the adverse expert is someone who is not credible, you have accomplished you objective of cross-examination. The following are some things that can be brought out in an effort to accomplish this:

1. Show that the expert derives a substantial portion of his/her annual income by testifying as an expert, preferable as an expert primarily for plaintiffs.

2. Show the expert's inflexibility and unwillingness to make any concessions.

3. Show lack of preparation and point out important factors not considered.

4. Show that the positions taken are illogical.

5. Confront the witnesses with contrary opinions expressed on other occasions.

F. Stay in control. Do not argue with the witness, ridicule the witness or display arrogance. This rule can be violated if the witness is someone who refuses to give a direct answer, is otherwise evasive or is becoming hostile.

G. Move quickly from point-to-point. Do not allow the expert to sit back and relax at any point in the examination.

H. Close on a high note. While it is important to strike early, it is equally important to close on a high note. Have one final question prepared in advance to use as a closing question.

I. If you achieve your objective, stop The single most important objective you are seeking to achieve on cross-examination is to discredit your opponent's expert witness If you achieve that one-third or one-half of the way through your prepared cross-examination, conclude the cross-examination because you have done your job.

CONFLICTS OF INTEREST

Norman G. Bastemeyer
Ethics Administrator
Iowa State Bar Association

H

I. SANCTIONS OR REMEDIES FOR VIOLATIONS OF APPLICABLE CONFLICTS OF INTEREST RULES

Iowa has adopted the ABA Model Code of Professional Conduct For Lawyers. The applicable Iowa Rules are found in Canon 5 and its EC's and DR's.

A. Discipline of Lawyers for Impermissible Conflicts.

1) The members of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association are commissioners of the Iowa Supreme Court to initiate or receive, and process complaints against any attorney licensed to practice law in Iowa for alleged violations of the Iowa Code of Professional Responsibility for Lawyers. Iowa Supreme Court Rule 118.2

2) Violation of the provisions of the Iowa Code of Professional Responsibility for lawyers could result in:

a) private admonition.
b) public reprimand.
c) suspension of attorney's license.
d) revocation of attorney's license.

B. Judicial Disqualification.

C. Injunction.

The injury to a client threatened by the adverse use of confidential information or other disloyalty can be guarded against through an injunction against the disloyal lawyer's divulgence of the information. Wolfram, Modern Legal Ethics, West Publishing Co. 1986 at page 329 citing Cord v. Smith, 338 F.2d 516, 519 (9th Cir. 1964).

D. Action for malpractice.

A lawyer who causes injury to a client through a conflicting representation may suffer a legal malpractice judgment for damages in favor of the injured client. Wolfram, Modern Legal Ethics, supra, at p. 329, citing Hill v. Okay Constr. Co., 312 Minn. 324, 252 N.W. 2d 107 (1977).

E. Fee Forfeiture. Wolfram, Modern Legal Ethics, supra, at p. 329, citing Silberger v. Prudence Bonds Corp., 180 F. 2d 917, 920-21 (2nd cir.), cert. denied 340 U.S. 831, 71 S. Ct. 37, 95 L. Ed. 610 (1950).

F. Reciprocal Disclosure.

Charles W. Wolfram in Modern Legal Ethics, West Publishing Co. 1986, at p. 329, suggests it might be possible for the court to restore the imbalance created by an improper disclosure by requiring the faithless lawyer to reveal to the injured client confidential information that the benefited second client provided the lawyer.

G. Penalty Dismissal.

"The extreme remedy of a penalty dismissal of the complaint of a party whose lawyer engaged in an impermissible conflict of interests has been granted if the information upon which the suit was based was supplied entirely by the lawyer for the defendant who switched sides to represent the plaintiff." Wolfram, Modern Legal Ethics, supra, at p. 330, citing Doe v. A. Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971).

H. Setting aside of Judgment.

"In an independent proceeding, the court can set aside a judgment obtained through the treachery of a lawyer who furthers his or her own client's defeat in litigation because of a conflict of interest benefiting the prevailing party." Wolfram, Modern Legal Ethics, supra, at p. 330, citing United States v. Throckmorton, 98 U.S. 61, 66, 25 L. Ed. 93 (1878).

II. PARTICULAR CONFLICTS OF INTEREST SITUATIONS

A. Representation Adverse to Existing Client

A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's, even if the two representations are unrelated, unless the clients consent and the lawyer believes he or she is able to represent each client without adversely affecting the other.

All that need be present is that one lawyer or firm is representing two clients, even in unrelated matters, with potentially conflicting interests.

Clients may consent to simultaneous representation following full disclosure. Even where consent is given, however, it may be clear that one lawyer or law firm cannot represent both parties. When consent is not given or when dual representation is not possible under the rules, lawyers engage in concurrent conflicting representations at their own risk for they may be required to withdraw from both clients' cases.

Iowa Code of Professional Responsibility for Lawyers:

"DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer."

(A) In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement.

(B) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(D).

(C) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(D).

(D) In the situations covered by DR 5-105(B) and (C), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(E) If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of his or his firm may accept or continue such employment."

See Committee Opinions 80-47, and 89-43, which would permit dual representation if certain requirements are met.

B. Issue Conflicts.

The problem that arises when a lawyer's advocacy of a legal position in one case could have negative consequences for a second client in another matter, or, if a lawyer urges a court to issue a ruling that would require the law to be interpreted in one way, does that preclude representation of another, otherwise unrelated client whose interests are best served by a contrary legal ruling?

1) There is little authority on the question. There is no provision in the Model Code.

2) The comment to Model Rule 1.7 states:

"A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in

cases pending in different trial courts, but it may be improper to do so in cases pending at the time in an appellate court."

3) The tentative draft of the Restatement of the Law Governing Lawyers, Section 209, Comment f (April 10, 1990) states:

"A lawyer ordinarily may take inconsistent legal positions in different courts at different times where necessary to pursue the interests of different clients, otherwise law firms would have to specialize in a single side of legal issues. However, a conflict is presented when a lawyer's action in Case A will directly create a material and adverse impact on Case B.

"Whether a conflict of interest exists requires an analysis of the facts of each situation. Merely indirect precedential effect on another client's legal position does not constitute a conflict. However, if a lawyer were contemporaneously to assert both sides of an unsettled point of law before the same tribunal on behalf of different clients, the argument in each case would inevitably affect the other. Absent informed consent . . . the lawyer would be required to withdraw from one of the matters because of the conflict of interest."

C. Representation Adverse to Former Client.

General Rule -

After a lawyer's representation of a client ceases, the lawyer may not, without the consent of the former client, represent another client in the same or in a substantially related matter in which the new client's interests are materially adverse to those of the former client.

1) Model Rules Jurisdictions.

Model Rule 1.9 provides:

"A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 (confidentiality) would permit with respect to a client or when the information has become generally known."

2) Model Code Jurisdictions.

The Model Code has no provision specifically addressing

representation adverse to a former client. However, by application of EC 4-6, which observes that a lawyer's DR 4-101 obligation to preserve the confidences and secrets of a client continues after termination of the employment, and DR 5-105 requiring a lawyer to decline employment if it would likely involve him in representing differing interests, Model Code states have reached the same result.

3) Substantial Relationship Test.

Both Model Rules states and Model Code states apply the "substantial relationship" test and require that the party seeking to disqualify counsel because of his prior representation of the adverse party must prove that a lawyer-client relationship previously existed, and that the subject matter of that relationship is substantially related to the matter at hand.

H

Representation adverse to a former client as to a matter "substantially related" to that prior representation is an ethical violation.

Public Reprimand imposed by Committee

9091-81

COMPLAINT SUMMARY: Complainant alleged respondent had represented her and her husband in the preparation of a pre-nuptial agreement and had then represented her in negotiating and drafting a farm lease, and in the preparation of a will providing for a 15 year trust, which named respondent as her trustee. Complainant alleged that respondent then filed and later dismissed an action on behalf of her husband for dissolution of marriage, advising her at that time how he wished she had contacted him first since he would rather represent her. Complainant further alleged that when her husband moved out shortly after dismissing his dissolution of marriage action, she contacted respondent who advised her concerning changing names on bank accounts and beneficiaries on life insurance policies. Complainant further alleged that notwithstanding her prior representation by respondent and his having advised her following her husband's departure, respondent then filed a new dissolution of marriage action against her on behalf of her husband and proposed interrogatories to her as to matters not known by her husband, but known by respondent because of his prior representation of her.

COMMITTEE ACTION: It was the determination of the committee that respondent be publicly reprimanded for bringing an action for dissolution of marriage against a party whom he had represented in the drafting of a pre-nuptial agreement, whom he had counselled and advised concerning her investments, for whom he had drawn a will providing for a testamentary trust naming himself as both executor and trustee, and whom he had counselled as to steps she should take to preserve her separate assets following the parties' estrangement, in violation of DR 5-105(A) and DR 4-101

of the Iowa Code of Professional Responsibility for Lawyers.

4) Committee on Professional Ethics and Conduct has imposed private admonitions for representation adverse to former client.

a) Lawyer privately admonished for bringing mortgage foreclosure against former client and reviewing that client's estate planning file in his office, a partner having drawn will and trusts for mortgage.

b) Lawyer privately admonished for referring to a former bankruptcy client as "somewhat devious" in brief filed on behalf of former client's spouse in a contested child custody matter, lawyer indicating she had learned of her former client's character in her prior representation of him.

c) Lawyers privately admonished who switched sides, representing former adverse party in a marriage dissolution in an effort to modify the dissolution decree.

d) See also committee files:
9091-50 - Admonition (in Appendix A)

D. Multiple Representation.

General Rule - A lawyer may represent more than one client in a particular matter only if the lawyer reasonably believes that he or she can adequately represent the interest of each client and all the clients consent to the representation after full disclosure of the implications of the multiple representation.

Client consent notwithstanding, a lawyer may not represent opposing parties in litigation, nor may the lawyer, outside of the litigation context, represent multiple parties to the same transaction whose interests or position are fundamentally antagonistic. But it is ethically permissible for a lawyer to represent multiple parties whose interests are generally aligned, such as parties to the formation of a corporation. However, should it become evident during the multiple representation that the lawyer cannot adequately represent the interests of each party, or should any party revoke consent, the lawyer must withdraw and may not thereafter represent one party against another on the same matter.

1) Model Rule 1.7 provides:

"(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

As to representation of more than one party in litigation, the comment to Rule 1.7 of the Model Rules points to "impermissible conflict" in the following situations:

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(1) substantial discrepancy in the parties' testimony.

(2) incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

2) DR 5-105 of the Model Code provides:

"(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to affect him in representing differing interests, except to the extent permitted under DR 5-205(C).
(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

3) Lawyer should not continue to represent either party if he finds himself in the predicament of having advised two conflicting sides to a controversy.

4) Nominally adverse parties.

Although a lawyer cannot represent both plaintiff and defendant

in the same suit, courts have held that a lawyer could represent nominally opposing parties who seek the same result.

8990-326

COMPLAINT SUMMARY: Complainant, an attorney, alleged respondent had been employed by an insurance carrier to represent one of its insureds, named as a third party defendant, in a property damage claim. Complainant alleged that after respondent filed an appearance on behalf of the insured and while that case was pending respondent then filed an action against that insured on behalf of the insurance carrier claiming the insured's policy did not cover the occurrence involved in the third party action against the insured.

COMMITTEE ACTION: It was the determination of the committee that although the respondent did in fact file an action against a party on whose behalf he had entered an appearance there was no real conflict in that respondent was employed to file an appearance on behalf of a deceased third party defendant after that decedent's estate had been reopened for the limited purpose of determining whether there was insurance coverage for the claim, all other claims being barred, and his subsequent action on behalf of the insurance carrier and against the insured was at the request of the insured's family and there was no possibility of a recovery against the insured decedent other than from that insurance policy. That there was no showing of improper conduct on the part of the respondent and the complaint was dismissed.

5) Family Law Matters.

a) Marriage Dissolutions - DR 5-105(A)

"In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement."

b) Family Estate Planning

8687-241 through 246

COMPLAINT SUMMARY: Complainant is one of six related individuals who filed a complaint against respondent as a result of his having secured their signatures to an instrument which transferred complainant's interest in a farm to a trust. Complainant alleged:

"_____ breached ethical obligations in giving me legal advice upon which he knew I would rely and drafting documents for my signature without making full disclosure of facts within his knowledge so as to apprise me of the risks involved, by representing parties whose interests were adverse to mine

and for their benefit rather than mine, and by obtaining mortgages on my equity in a 409 acre farm in _____ County, Iowa, without my knowledge and consent, as a result of which I lost all of my equity in the farm."

COMMITTEE ACTION: The committee consolidated complaints 8687-241 through 8687-246 into one matter as all six complaints were the identical complaints of the six persons affected by the respondent's actions. it was the determination of the committee that respondent be admonished that giving advice to persons not represented by a lawyer, other than the advice to secure counsel, when the interests of such persons were or had a reasonable possibility of being in conflict with the interest of his client was in violation of EC 7-13 and DR 7-104(A)(2) of the Iowa Code of Professional Responsibility for Lawyers.

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6) Insurance Cases.

A lawyer hired or employed by an insurance company to represent an insured must represent the insured as his client with undivided loyalty.

a) Representation of insured by insurance company's in-house counsel.

(1) North Carolina Supreme Court has ruled that representation of insureds by an insurance company's in house counsel violated that state's ban on the practice of law by corporations. Gardner v. North Carolina State Bar, 341 SE 2d 517, (NC 1986).

(2) Prevailing rule is that the use of in-house counsel by an insurance company does not constitute unauthorized practice of law by a corporation.

(3) Iowa Rule - COPE Opinions 87-16, 88-14

87-16 - In-house insurance counsel can not represent insureds.

- not permissible even with full disclosure.
- potential for conflict too great, e.g. - in-house insurance counsel discovers his insurer/ employer could exert a policy defense.

88-14 - Modifies 87-16 to permit representation of insured's by insurer's in-house counsel provided insurer executes a written agreement:

- guaranteeing the insurer will not dispute insured's coverage.
- the insurer will not invoke any policy defense.

- the insurer would pay full recovery, even if in excess of policy limits.
- insurer agrees to prosecute insured's rights against all parties.
- insurer will make its files on insured available to insured on request.

E. Aggregate Settlements.

"DR 5-106 settling similar claims of clients.
(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement."

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F. Lawyers Interests Adverse to Clients.

1) Business Relationship With a Client.

"DR 5-104 Limiting Business Relations With a Client.
(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

"EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

a) In Committee v. Mershon, 316 N.W. 2d 895 (Iowa 1982) the court found Mershon had entered into a business transaction with a client without recommending that the client obtain independent advice and without providing full disclosure. The court publicly reprimanded Mershon even though he did not act dishonestly and

did not make a profit on the transaction. The court acknowledged that Mershon had made the client fully aware of the nature and terms of the transaction but held he should have told the client to obtain independent advice such as a disinterested attorney would give.

b) In Committee v. Postma, 430 N.W. 2d 387 (Iowa 1988) the court suspended Postma's license with no possibility of reinstatement for six months upon a finding that among other violations he had entered into a business venture with a client in violation of DR 5-104(A). The court stated:

> "The present case is a textbook example of why we have done our best to discourage business ventures between attorneys and their clients. The client is in a vulnerable position when the attorney's personal interests compete with the client's. In (Mershon) the facts were far less offensive than those appearing here because Mershon was found to be forthright and honest and gained no personal profit from the transaction."

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c) In Committee v. Hall, 463 N.W. 2d 30 (Iowa 1990) the court revoked Hall's license for among other things entering into a series of business relationships with a client without advising the client that his professional judgment might be affected or advising the client that he should seek independent counsel.

d) Public Reprimands imposed by Committee

8990-29

COMPLAINT SUMMARY: Complainant, an attorney, was employed by one who though a client of respondent's had become associated with respondent in a real estate venture, when both respondent and that client were sued as parties having an interest in that real estate. Complainant alleged respondent, having secured an award for that client as the result of the death of her husband, had prevailed on her to first loan him money from her recovery and then to invest in a real estate venture promoted by respondent. Complainant alleged respondent did not advise the client to secure independent counsel to advise her, either at the time of the original personal loan to respondent or later at the time of her investment in respondent's real estate venture.

COMMITTEE ACTION: It was the determination of the committee that respondent be publicly reprimanded for entering into a business transaction with a client in which they had differing interests therein without making a full disclosure to the client, contrary to DR 5-104(A) of the Iowa Code of Professional Responsibility for Lawyers.

8990-220

COMPLAINT SUMMARY: Information submitted to the committee by an

attorney who had represented a used car dealership indicated that though respondent was a 50% shareholder in the dealership, he had negotiated a lease from himself and his wife of certain business property to that dealership and that respondent and his wife had initiated a civil action against the dealership, of which respondent was a 50% shareholder, for payment of rentals.

COMMITTEE ACTION: It was the determination of the committee that respondent be publicly reprimanded both for entering into a business transaction with a client in which he had differing interests therein without making a full disclosure to the client, contrary to DR 5-104(A) of the Iowa Code of Professional Responsibility for Lawyers, and for thereafter as attorney preparing a lease on behalf of both lessor and lessee in which he had a personal interest both as lessor and lessee thus involving himself in the multiple representation of several parties with adverse interests, contrary to DR 5-105, and in which he had a personal interest, contrary to DR 5-103 of the Iowa Code of Professional Responsibility for Lawyers.

e) See also committee file: 9091-96 Committee determination to file with Grievance Commission (in Appendix A).

2) Taking Security Interest in Client's Property.

"DR 5-103 Avoiding Acquisition of Interest in Litigation.
(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case."

a) In Committee vs. McCullough 465 N.W. 2d 878 (Iowa 1991), although the court did not discuss the applicability of DR 5-103(A), and found that DR 5-104(A), entering into a business transaction with a client, was not applicable to a consensual security transaction between a lawyer and client, it nevertheless imposed a one year suspension on a lawyer who, among other violations, took a mortgage on the real estate of a dissolution client, as well as a confession of judgment, to secure his fee, finding a violation of EC 5-3.

The court stated:

"EC 5-3 does not prohibit a lawyer from accepting security for fees after the lawyer is retained. It is only if the lawyer reasonably foresees that such acceptance of security would probably interfere with the lawyer's independent judgment that the lawyer has any duty under EC 5-3."

If such interference is reasonably foreseeable, the lawyer must disclose and explain this conflict to the client. In doing so, the lawyer must fully inform the client of the nature and effect of the security and of the client's own rights and interests in the security. In addition, the lawyer must give the client such advice that the lawyer would have been expected to give had the transaction been between the client and a stranger.

If, in the face of this disclosure and explanation, the client still wants the lawyer's representation, the lawyer may take the security and proceed with the representation. If the client balks, the lawyer's duty is clear: withdraw the request for security or withdraw from employment.

Here the commission concluded McCullough violated EC 5-3 when he took the mortgage and confession of judgment. The Commission reached its conclusion without explanation. Little explanation, however, was necessary.

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Obviously, McCullough's independent judgment was adversely affected when he took the mortgage. Had he been exercising independent judgment, he would not have taken a mortgage that contained material misstatements of fact. McCullough's professional judgment would remain tainted and compromised until the transaction was undone. The transaction was not undone, and its wrongfulness was compounded when McCullough took the confession of judgment that also contained material misstatements of fact." Committee v. McCullough, id. at 885.

b) However, in Committee vs. McCullough, 468 N.W. 2d 458 (Iowa 1991), the court did not find a violation of DR 5-103(A) notwithstanding that respondent took a mortgage on his client's interest in the real estate of her deceased husband, while probating that estate.

Respondent successfully pursued an action to set aside a dissolution decree. Respondent and his client entered into an agreement to secure payment of his contingent fee of $158,793 by a real estate mortgage on property of the estate in which the client had acquired a spouse's statutory share.

Although suspending respondent for 60 days for other violations, the court cited its prior McCullough decision, 465 N.W. 2d 878, 884 (Iowa 1991), that taking a contractual security interest to secure payment of attorney fees did not constitute entering into a business transaction with a client in violation of DR 5-104(A) and because the mortgage transaction occurred after the litigation was concluded; neither was there a violation of DR 5-103(A). In a footnote at page 461 of that decision the court stated:

> "3. Apart from the purely temporal considerations involved, we doubt that DR 5-103(A) prohibits a lawyer from taking a security interest in a res sought to be recovered at the

inception of the attorney-client relationship unless some special circumstance exists which causes this to affect the attorney's independent judgment more demonstrably than does a contingent fee agreement. It is recognized in EC 5-7 that 'it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation.' A general prohibition against taking such security could place the lawyer at a substantial disadvantage to other creditors of the client or the owner of the res."

c) As to taking a security interest in a client's property which is not the subject of litigation or your representation of the client, see Committee Opinion 82-14.

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"82-14 November 17, 1982
FEES - SECURING BY MORTGAGE ON HOMESTEAD

You have requested an opinion as follows:

> 'In the event we wish to secure our attorney's fee by a mortgage upon the homestead of the client accompanied by a promissory note after the case has been concluded, what is your suggested procedure to accomplish this end? (I suspect that full disclosure, the suggestion to consult an attorney, etc. would be appropriate.)'

It is the opinion of the committee that this would not be unethical provided you suggest to the client to get counsel and advise him not to rely on you in this matter. It is also suggested that it would be best for you to document your actions. EC 2-25 bears upon this question as well."

3) Sexual Involvement with Divorce Client.

This represents a conflict because a lawyer, who should explore the possibility of reconciliation, would have a personal interest in seeing that there was no reconciliation.

In Committee v. Hill, 439 N.W. 2d 57, (Iowa 1989) the Iowa Supreme Court suspended the license of a lawyer who had sexual intercourse with a divorce client who was unable to pay a retainer and who offered to have sex with the lawyer for money. The court stated that any lawyer who undertakes a divorce action must realize that reconciliation is a possibility and that a sexual liaison between a lawyer and a divorce client could affect custody determinations and thereby prejudice both the client and any minor children of the marriage.

See also committee file 8889-174, Admonition (in Appendix A)

G. Gifts from Client.

A lawyer's acceptance of substantial gifts from clients may be closely scrutinized by a court for fraud, overreaching, and undue influence. Under the Iowa Code of Professional Responsibility for Lawyers (EC 5-5), a lawyer should urge a client who wishes to make a gift to the lawyer, to consult a disinterested party, and should insist that any necessary document be prepared by another lawyer. Under the Model Rules, a lawyer is forbidden to prepare a legal document for anyone, other than a relative, that makes a substantial gift to the lawyer or his family.

> "EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances."

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1) Attorney publicly reprimanded for accepting inter-vivos gifts from elderly client.

8990-145

COMPLAINT SUMMARY: Complainant alleged she and her brother, concerned that their sister had been loaning thousands of dollars to a family whose members were spendthrifts and irresponsible, conferred with respondent in an effort to assist her in conserving her assets, but instead respondent redrew her will to name himself as a beneficiary and caused her to have certificates of deposit reissued jointly in her own name and that of respondent.

COMMITTEE ACTION: It was the determination of the committee that respondent be publicly reprimanded for participating in a decedent's inter-vivos transfer of certificates of deposit in which the decedent had been the sole owner to ownership by the decedent and respondent as joint tenants without urging that before she did so the decedent should secure disinterested advice from an independent competent person cognizant of all of the circumstances. It was the determination of the committee that such conduct was in violation of EC 5-5 of the Iowa Code of Professional Responsibility for Lawyers.

2) Attorney publicly reprimanded for drafting a will which provided a bequest for the attorney.

9091-7

COMPLAINT SUMMARY: Complainant, though not indicating her relationship to the decedent, alleged that the respondent had a

conflict of interest in that he was both an heir of the decedent and acted as attorney for the decedent's estate. Complainant further alleged that the respondent had drafted the decedent's will in such a fashion as to provide for a waiver of bond for the executor in the event the executor employed respondent as the attorney for the estate. Complainant further alleged that the respondent had transferred assets totalling $93,484.52 from the estate of the decedent's spouse to the decedent "to avoid taxes on her estate" which funds were then not available in the estate of decedent's spouse so as to pass to the spouse's heirs.

COMMITTEE ACTION: It was the determination of the committee that respondent be publicly reprimanded for (1) drafting a decedent's last will and testament in which he was included as a beneficiary although he was not related by consanguinity or affinity within the third degree, contrary to DR 5-101(B) of the Iowa Code of Professional Responsibility for Lawyers; and (2) drafting a last will and testament conditioning the waiver of bond for the executor on his employment of respondent as attorney for the decedent's estate without an express statement in the will or in a second concurrent instrument that there were compelling circumstances necessitating the executor's employment of respondent as attorney for the estate and setting out those circumstances in detail, contrary to EC 5-6 and committee opinion 79-70.

3) In Committee v. Behnke, 276 N.W. 2d 838 (Iowa 1979), Behnke was suspended for at least three years for drafting wills naming himself as a contingent beneficiary and executor in violation of EC 5-5. The Iowa Supreme Court held that a violation of an EC alone would support disciplinary action.

4) In Committee v. Morrison, 320 N.W. 2d 564 (Iowa 1983) Morrison was reprimanded for preparing a will and codicil for a longtime client benefiting both himself and his wife.

H. Financial Assistance to Client.

While the Model Rules provides for a more liberal approach, and would permit a lawyer to advance costs of litigation, contingent upon recovery, under the Model Code provision, applicable to Iowa, though a lawyer may advance or guarantee the expenses of litigation, the client must remain ultimately liable.

1) Model Rule 1.8(e) provides:

"A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs on behalf of a client."

2) DR 5-103(B):

"While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

3) See also Iowa Ethics Opinion 78-9 (not included in Appendix B) that it is proper for an attorney to advance costs of litigation and investigation as set out in DR 5-103(B) provided the client remains ultimately liable.

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4) Posting Criminal Bond for a client

While two state ethics committees (Oregon Ethics Opinion 436 (1981) and California Ethics Opinion 1981-55) have stated posting bail and guaranteeing litigation bond were expenses of litigation that a lawyer may advance to a client, Iowa Ethics Opinion 86-4 announces a more restrictive position. The Iowa opinion discussed three specific instances of potential conflicts, and stated that in general lawyers should not post their personal bond, but that there might be circumstances when it would be justified.

APPENDIX A

COMMITTEE ACTION FROM OFFICIAL MINUTES OF COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION AS FILED WITH THE IOWA SUPREME COURT OF SELECTED COMPLAINTS INVOLVING ALLEGATIONS OF CONFLICT OF INTEREST

8889-116

COMPLAINT SUMMARY:

Complainant initially filed his complaint against both respondent, and respondent's partner, _____ (committee file 8889-117) with the _____ County Bar Association's Grievance Committee. That committee secured respondent's response, conducted an investigation, and concluding the complaint warranted further review and investigation, forwarded its report of investigation and its file to the committee. Complainant alleged both respondents had represented him in numerous matters concerning his business of rental and repair of tools and equipment in leased premises over a period of several years. This included representation by respondent's partner at complainant's deposition taken pursuant to the marriage dissolution of the landlords of his leased business premises. Complainant alleged it was apparent at that deposition concerning his lease that an effort would be made to terminate his lease. Complainant alleged that after that deposition a conservatorship was commenced for the landlord-husband, respondent represented the conservatorship, made contacts with complainant while he was acting as attorney for the landlord's conservator, and as attorney for the conservator participated in proceedings to sell the leased property contrary to complainant's interests, without notice to complainant, and which sale was contingent on breaking complainant's lease.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished, that upon recognition that sale proceedings in the conservatorship were adverse to complainant's interests, his failure to advise complainant of that conflict and the necessity for him to secure other counsel was in violation of DR 5-105(C) and (D) of the Iowa Code of Professional Responsibility for Lawyers.

8889-117

COMPLAINT SUMMARY:

Complainant initially filed his complaint against both respondent, and respondent's partner, _____ (committee file 8889-116) with the _____ County Bar Association's Grievance Committee. That committee secured respondent's response, conducted an investigation, and concluding the complaint warranted further review and investigation, forwarded its report of investigation and its file to the committee. Complainant alleged both respondents had represented him in numerous matters concerning his business of rental and repair of tools and equipment in leased premises over a period of several years. This included representation by respondent at complainant's deposition taken pursuant to the marriage dissolution of the landlords of his leased business premises. Complainant alleged it was apparent at that deposition

concerning his lease that an effort would be made to terminate his lease. Complainant alleged that after that deposition a conservatorship was commenced for the landlord-husband, respondent's partner represented the conservatorship, made contacts with complainant while he was acting as attorney for the landlord's conservator, and as attorney for the conservator participated in proceedings to sell the leased property contrary to complainant's interests, without notice to complainant, and which sale was contingent on breaking complainant's lease.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished, that upon recognition that sale proceedings in the conservatorship were adverse to complainant's interests, his failure to advise complainant of that conflict and the necessity for him to secure other counsel was in violation of DR 5-105(C) and (D) of the Iowa Code of Professional Responsibility for Lawyers.

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8889-138

COMPLAINT SUMMARY:

Complainant alleged that on behalf of her father's estate she listed his home for sale with a realty firm and that respondent, in addition to being an attorney, was a licensed realtor employed by that firm. Complainant alleged that respondent, though a realtor employed by the firm she had engaged to sell the property, then undertook to represent the buyer, had improperly held up its sale, had permitted the buyer to take possession and re-sold the property for the buyer, all prior to closing.

COMMITTEE ACTION:

It was the determination of the committee to file its complaint with the Grievance Commission.

8889-145

COMPLAINT SUMMARY:

Complainant, an attorney, represented the heirs of a decedent whose estate had been probated and closed by attorney _____, respondent's father-in-law, and alleged that _____ had died following the death of their decedent. Those heirs, represented by complainant, had brought an action against the executors of the _____ Estate, and against respondent, seeking to reopen the _____ estate so as to impress their claim for legal malpractice, alleging there had not been a total distribution of the assets of their decedent. Those heirs joined respondent, and alleged that as _____ partner, he was jointly responsible. Complainant alleged that respondent, who in response to discovery, alleged he had never been _____ partner, had violated EC 2-13 by holding himself out as _____ partner prior to _____ death, and in continuing to use the name "_____" as if he were a bona fide successor. Complainant further alleged respondent's present denial that he was a partner of _____ was an attempt to limit liability to a client contrary to DR 6-102.

Complainant further alleged that respondent represented four of the decedent's clients subsequent to _____'s death advising them concerning their interests as heirs in their mother's estate, which was a conflict of interest because of their potential claims against the _____ estate.

COMMITTEE ACTION:

It was the determination of the committee that respondent be publicly reprimanded for holding himself out as a partner when no partnership existed, contrary to DR 1-102(C); neglecting to ascertain the status of a decedent's estate proceedings on behalf of those of decedent's heirs who were his clients, contrary to DR 6-102(A)(3); and failure to advise those same heirs of a potential conflict between their interests and himself either as successor to the firm or as the attorney for the estate of the attorney who had initially probated decedent's estate, contrary to DR 5-101(A) and DR 5-105(D) of the Iowa Code of Professional Responsibility for Lawyers.

8889-174

COMPLAINT SUMMARY:

Respondent, upon receipt of a threat to report him unless he paid a sum of money to the ex-husband of a dissolution client, came forward to advise the committee that he had developed a sexual relationship with his client while representing her in a dissolution matter and though he had offered to withdraw from that representation after commencing the sexual relationship, had not done so when she had requested that he continue to represent her.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that his sexual involvement with a client who had employed him for a marriage dissolution was in violation of DR 5-101(A) of the Iowa Code of Professional Responsibility for Lawyers.

8990-31

COMPLAINT SUMMARY:

Complainant alleged respondent had represented his first wife in her dissolution action against complainant and then represented complainant's second wife in her dissolution. Complainant alleged respondent's representation of his second wife was a conflict of interest because any award of alimony to the second wife would require him to file for a modification to reduce his obligation to his first wife. Complainant further alleged that though respondent knew complainant's wife was pregnant by another man he intentionally withheld that information from the court.

COMMITTEE ACTION:

It was the determination of the committee that the respondent be admonished that inasmuch as the interests of the two ex-wives were at least potentially adverse that it was improper and a conflict of interest to pursue

a dissolution of marriage against an individual whom he had previously pursued on behalf of another of his ex-wives.

8990-64

COMPLAINT SUMMARY:

Complainant alleged he employed respondent in 1974 as to a divorce action, that respondent filed the petition on his behalf and sent complainant a statement for $250. Complainant alleged that his wife had suggested they try to work out a stipulation without the necessity of her employing an attorney as a consequence of which respondent had talked with both of them, and that when their negotiations broke down respondent withdrew, citing a conflict once he had been in contact with both parties. Complainant alleged he and his wife then each employed other counsel to conclude that divorce. Complainant further alleged that though respondent had initially represented him in his 1974 divorce, filing the petition as complainant's attorney, respondent appeared on behalf of his ex-wife in modification proceedings filed in 1989.

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COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that having filed a petition on behalf of the complainant in complainant's marriage dissolution it was improper and a conflict of interest to thereafter file pleadings on behalf of complainant's ex-wife in that same matter. That such conduct was in violation of DR 5-105(A) of the Iowa Code of Professional Responsibility for Lawyers.

8990-134:

COMPLAINT SUMMARY:

The _____ County Bar Association forwarded its file concerning its investigation of respondent's handling of an estate which indicated (1) respondent obtained blank checks from the Executor, bearing the Executor's signature and wrote checks to himself for attorney's fees in excess of the statutory limit and without securing court approval for attorneys fees; (2) was dilatory in processing the estate; and (3) allowed a claim against the estate in the amount of $5,000 although no formal claim had been filed and then obtained a fee from the claimants equal to 10% of their claim.

COMMITTEE ACTION:

It was the determination of the Committee to file its complaint with the Grievance Commission.

8990-292

COMPLAINT SUMMARY:

Complainant alleged that his wife, represented by respondent filed a petition for dissolution of their marriage on June 5, 1989, and though his wife's petition alleged that appointment of a conciliator would not preserve the marriage, a conciliator had been appointed pursuant to his application.

Complainant alleged that on July 20, 1989, his wife then filed an application for an order for his involuntary hospitalization following their July 18th meeting with the conciliator and that he was ordered to be taken into custody and transported to the Mental Health Institute at _____ on an order signed by respondent as Judicial Hospitalization Referee. Complainant alleged that on July 25, following hearing before another Judicial Hospitalization Referee, his wife's application was denied and he was released from custody. Complainant alleged it was a conflict of interest for respondent to order his commitment as a Judicial Hospitalization Referee while serving as his wife's attorney in a marriage dissolution.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that it was improper for her to participate as a judicial hospitalization referee in the commitment of the husband of her dissolution client. That her participation as a judicial hospitalization referee in those proceedings was in violation of DR 9-101(A) of the Iowa Code of Professional Responsibility for Lawyers.

9091-12

COMPLAINT SUMMARY:

Complainant, an Iowa District Court Judge, enclosed copies of pleadings in a probate matter and correspondence from respondent which indicated that respondent had been employed by a sister of a decedent to contest that decedent's will, the decedent having left one-half of his estate to a church and a hospital. Decedent's sister had been named as executor of the decedent's last will and testament, and, as executor, had employed another attorney to probate the decedent's estate. Complainant forwarded a copy of a pleading filed by the attorney that had been employed to probate that estate seeking leave of Court to withdraw, his withdrawal having been demanded by respondent, on behalf of the will contestant/executor, respondent announcing his intention to replace that attorney as attorney for the estate in addition to representing the sister, as an heir, in the will contest. Complainant alleged that respondent's representation of the sister, as a will contestant, and of the executor in the probate of the estate, was a conflict of interest.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that having written demand letters on behalf of a party who wished to contest the decedent's will, having counselled and advised others to become will contestants, and his office having prepared answers to interrogatories on behalf of a will contestant, that his subsequent representation of the executor in the probate of the decedent's estate was a conflict of interest contrary to DR 5-105 of the Iowa Code of Professional Responsibility for Lawyers.

9091-18

COMPLAINT SUMMARY:

Complainant alleged respondent had a conflict of interest when he advised complainant to execute a second mortgage on his home to secure fees owned by complainant before he would represent complainant in a bankruptcy. Complainant alleged respondent did so without advising him his fees would otherwise be "wiped out" as an unsecured creditor and by so doing caused complainant to favor one creditor (respondent) over others.

COMMITTEE ACTION:

It was the determination of the committee to refer the matter to ethics counsel for filing with the Grievance Commission.

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9091-51

COMPLAINT SUMMARY:

Complainant alleged he employed respondent to pursue his personal injury claim and that he agreed to a settlement which involved deferred payments. Complainant alleged respondent improperly computed his contingent fee as a percentage of the total payments, rather than on the present value of the deferred payments and required that complainant give him a mortgage on his homestead to secure payment of his fee.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that it was improper to take a security interest in the property of a client without advising that client to secure outside counsel prior to the execution of the instrument giving respondent such security interest. That respondent's failure to advise his client to confer with other counsel prior to the execution of such security agreement was in violation of DR 5-104(A) of the Iowa Code of Professional Responsibility for Lawyers and Committee Opinion 82-14.

9091-80

COMPLAINT SUMMARY:

Complainant alleged that when he and another individual formed a corporation, respondent represented each of them and continued to represent each of them, as well as their corporation in negotiating a lease and purchase of equipment from both a corporation and a partnership. Complainant alleged respondent also represented the lessors at the time of that lease. Complainant alleged respondent then represented both himself and the other shareholder when he acquired the other shareholder's stock.

Complainant further alleged that despite respondent's representation of himself and his corporation in the execution of the lease, respondent represented the lessor in an action against him as guarantor of the lease payments.

COMMITTEE ACTION:

It was the determination of the committee that respondent be admonished that his representation of the complainant in the incorporation of a business entity for the acquisition of a tavern business and his subsequent work on behalf of that corporate entity were substantially related to complainant's obligations as guarantor on the lease which was subsequently assigned so as to preclude respondent from representation of parties adverse to complainant with respect to that business lease. That respondent be further admonished that his subsequent direct communications to complainant while complainant was an adverse party represented by counsel were in violation of DR 7-104(A) of the Iowa Code of Professional Responsibility for Lawyers.

9091-96

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COMPLAINT SUMMARY:

As a part of its investigation of other matters concerning respondent the committee was provided with a copy of a written agreement wherein respondent and respondent's client entered into a business relationship, the written instrument commemorating that agreement, having recited that respondent:

> "Conceptualized and drafted the legal instruments that were executed in this regard and, together with (respondent's client), negotiated the aforesaid transaction with _____ Bank. At all times throughout the negotiation and consummation of the aforesaid transaction, (respondent's client) and (respondent) functioned as joint ventures on a 50-50 basis."

The language of that written agreement, bearing respondent's signature, warranted an allegation that respondent entered into a business transaction with a client in which they had differing interests without a full disclosure to the client, contrary to DR 5-104(A) of the Iowa Code of Professional Responsibility for Lawyers.

COMMITTEE ACTION:

It was the determination of the committee to confirm its prior determination, pursuant to telephone conference, to refer the complaint to ethics counsel for filing with the Grievance Commission.

CONFLICT:

CAVEAT - Each conflict opinion applies only to the facts involved therein. Each question of conflict must be determined on its own merits.

H

Representing Plaintiff v. Person Prosecuted by Counsel	76-18
Representing Malpractice Actions v. Doctor on Staff of Client Hospital	80-33
Same Firm Representing Dram Shop Defendants	83-1
Sister - County Attorney	88-12
Specific Legal Assignment When Council Member also is in Same Firm	68-6
Suing Existing Client	88-28
Trustee and Counsel of a Corporation	68-4
Wife of County Attorney Defending in Other Counties	67-4

H

66-8A July 1, 1966

IMPROPER FOR FIRM TO REPRESENT PARTY AGAINST MUNICIPALITY WHILE CITY ATTORNEY IS A MEMBER OF ASSOCIATE OF THE FIRM

The letter complaining of the relationship of your firm with the City raised a question of ethics which the Professional Ethics and Conduct Committee of The Iowa State Bar Association immediately undertook to investigate and determine upon receipt of the original letter of complaint. The subsequent withdrawal of the complaint by that firm and your very courteous response with supporting documents, in the opinion of the Committee, still left undetermined the question of the propriety of the action involved.

Please be informed that it was the determination of the Committee at its meeting that the action of your firm in representing a plaintiff's action against the City while a person in your firm (even though not at that time a partner) was and had been city attorney was improper. It is also the opinion of the Committee that it is not possible to waive any case of unprofessional conduct by letters or agreements. The Committee has directed the writing of this letter, not in any sense as a reprimand, but as an admonition to you as to the opinion of the Committee concerning this relationship.

66-10 September 21, 1966

IMPROPER FOR CITY ATTORNEY TO CONTINUE TO REPRESENT OBJECTORS IN SUIT TO PREVENT CONSTRUCTION OF SEWAGE TREATMENT FACILITIES

Apparently you represented objectors in litigation seeking to prevent the construction of the sewage treatment facility Apparently the case remains on the docket and you remain of record as attorney for the objectors. Apparently also as city attorney you now will have exactly the opposite responsibility, than was yours when the first suit was filed.

If the above summary of the facts is correct, it it our opinion that there is a direct conflict of interest in your representing the city in this matter, and it is our belief that you should disassociate yourself entirely from any participation in the matter. Your acting as city attorney is in direct conflict with your responsibility to your original clients, and if you were to act as attorney for the original objectors you would be in conflict with your responsibility to the city.

The subject of conflict of interest is covered by Canon 6 which has been interpreted by many court decisions and opinions of the American Bar Association Committee on Professional Ethics and Conduct and is exhaustively covered in Drinker on "Legal Ethics", particularly pages 111 and 112.

67-4 August 28, 1967

IMPROPER FOR WIFE OF COUNTY ATTORNEY TO DEFEND IN OTHER SURROUNDING COUNTIES

We have reviewed your letter of August 15 inquiring as to the propriety of your wife's acting as attorney for persons being prosecuted in counties other than that where you are presently serving as county attorney.

On the basis of Opinion Nos. 30, 118 and 922 of the Professional Ethics Committee of the American Bar Association, we believe that such representation would be improper.

68-4 September 5, 1968

IT IS NOT IMPROPER SIMULTANEOUSLY TO SERVE AS TRUSTEE AND COUNSEL OF A CORPORATION (IN THIS CASE A COLLEGE)

In response to your inquiry, it is the opinion of this Committee that it is not a violation of professional ethics for a lawyer to serve as a Trustee of a corporation and at the same time serve as legal counsel for said corporation.

You are cautioned, as always in the practice of law, to avoid conflict of interest if it should occur.

68-6 October 25, 1968

IT IS NOT IMPROPER TO RETAIN FOR SPECIFIC LEGAL ASSIGNMENT A PARTNER OF THE FIRM OF WHICH A COUNCIL MEMBER IS A SALARIED EMPLOYEE

The city is engaged in a labor controversy, and under a Code provision the court has ordered the two parties to arbitrate. This arbitration is mandatory but not binding on the parties.

Heretofore an attorney has consulted with and advised the city attorney in labor matters, and in particular in this matter, without charge or any formal understanding. The city would now like to employ the attorney to handle the arbitration proceeding in behalf of the city and perhaps to continue whatever negotiations follow. A council member is an employed attorney in the firm of the attorney sought to be employed. The city attorney has requested an opinion as to whether there is any impropriety if this employment takes place.

There are statutory provisions which relate to the subject involved, the most pertinent is Section 368A.22-2.e. We think its provisions exclude from proscribed conduct this very situation. Also Chapter 741, Code of Iowa, and Chapter 107 of the Session Laws of the 62nd General Assembly relate to the subject of such employment, but do not have any bearing on this precise question.

The Committee felt that there is nothing improper in this proposed relationship, though they all felt there would be some political questioning concerning it. The Committee felt furthermore that a full disclosure should be made of the relationship of the attorney to the council member and that the council member should not participate in voting on the employment of the attorney.

70-1 January 12, 1970

REPRESENTATION OF MODEL CITIES PROJECT ON RETAINER, WHILE FIRM REPRESENTS PLAINTIFF IN PENDING ACTION VS CITY BY AGREEMENT (NOT ACTUALLY ADVERSARY) IS PROPER PROVIDED THERE IS FULL DISCLOSURE

You made inquiry as to the propriety of being employed as legal counsel for the Model Cities Project on a yearly retainer basis, having in mind that your law partner has previously been retained by the Housing Corporation to defend a law suit in behalf of that corporation brought by the City arising out of a federal housing project operated in approximately the year 1946, which litigation was entered into by mutual agreement between the parties, and in which you have had and have now no direct participation.

The pertinent portion of Canon 6, which applies to the situation your question presents, reads as follows:

> "It is unprofessional to represent conflicting interests except by express consent of all concerned given after a full disclosure of the facts."

One member of a firm may not represent parties whose interests conflict with those represented by another member of the firm. See, among others, Formal Opinions 33 and 192 of the American Bar Association Committee on Professional Ethics.

There is case authority to the effect that a lawyer may not represent a client litigating against a party represented by another member of his firm while that said representation is active. One example is Grievance Committee v. Rottner, 203 A. 2d 82. Usually such cases do not involve disclosure.

Two important considerations distinguish the question you have submitted. They are, first, that in your case full knowledge of all the facts is in the hands of each of the parties involved, the management of the Housing Corporation and the members of the City Council. Second, the pending litigation is unrelated to the proposed responsibilities for the Model Cities Project which is itself a project directed only to a particular portion of the City and to the people residing therein, but receiving its authority from the City Council.

It is the opinion of this Committee that if there is public disclosure by a full statement made in a meeting of the City Council disclosing all the facts and if there is some written communication to the City Council from the management of the Housing Corporation affirming knowledge of the full facts and consenting, there would be no impropriety in the proposed employment set forth in your letter.

70-8 June 29, 1970

BANKER ALSO PRACTICING LAW IS NOT PROPER. HE SHOULD DO ONE OR THE OTHER

You have made inquiry concerning lawyers who are also part-time bankers. To the Committee's knowledge we have only had one case of this, and that was disposed of by the lawyer agreeing to quit practicing law and to devote his time to banking, and the Committee then determined that merely making out income tax return as such is not the practice of law, for of course accountants and bookkeepers, etc. hold themselves out as tax return service personnel. The lawyer was only permitted to finish up the few cases of probate which he had pending. To the best of our knowledge this lawyer is not now practicing, but is a banker. This is the position our Committee would take in any event.

70-14 October 27, 1970

NOT IMPROPER FOR LAWYER—CITY COUNCILMAN TO DEFEND TRAFFIC CHARGE BROUGHT UNDER STATE CODE WHERE CITY POLICEMAN IS COM—PLAINING WITNESS

This is in response to your request for an opinion as to whether it would be proper for you, as an elected member of the City Council, to defend a traffic charge brought under the State Code where the complaining witness is a city policeman.

This opinion presumes the continuation of your practice of not handling any traffic cases arising under the city ordinances, as you indicate you have been doing.

It is the opinion of the Committee that such action on your part would not be improper.

71-2 January 27, 1971

PROPER FOR ATTORNEY-CITY COUNCILMAN TO REPRESENT PERSONS

CHARGED UNDER STATE LAW. IMPROPER FOR ATTORNEY-CITY COUNCILMAN TO REPRESENT PERSONS CHARGED UNDER CITY ORDINANCE.

On September 17, 1970, Mr. B requested an opinion from this Committee concerning defense by him, as an elected member of the City Council, of persons charged under state law. A copy of his letter is enclosed

On October 27, 1970, this Committee replied that in its opinion such activity would not be improper. A copy of that letter is enclosed.

Your request of November 18, 1970, has now been received by this Committee, and the following opinion is in response thereto:

If Mr. B were to represent defendants charged under city ordinances, there would be conflict in his representation of interests adverse to those of the city. But ordinarily the right of a defendant to be represented by counsel seems much more important than to make a general charge that this lawyer would be representing adverse interests where the matter involved state statutes.

Ordinarily, also, it would not seem justifiable to make a general charge that his questioning city police officers, who undoubtedly are under Civil Service, and in a City Manager city do not work directly under the Council, would intimidate them or otherwise be improper or that by his being one of several members of the Council there would be cause for fear that he could adversely affect the wages of the officers or the policies of the police force.

The above statements, of course, are based on the assumption that Mr. B is conducting himself properly in all respects. If, in fact, in his conduct of such defense, or in his relations with the city police officers or with others, including the general public, there were harassment by him or threats or intimidation or any other wronging, disciplinary action probably would be indicated. This Committee would need to be informed of the facts before undertaking consideration of that question,

Attention also is invited to the obligation of lawyers to serve in public office. Categorically to deny a lawyer-city councilman the right to defend others than those charged under city ordinance violations, where city policemen are involved, does not seem proper in this consideration. Thus, in this Committee's opinion, whether or not Mr. B is operating improperly is entirely a question of facts not now in this Committee's hands.

72-7 November 19, 1972

IMPROPER FOR COUNTY ATTORNEY'S PARTNER TO DEFEND CRIMINALS IN COUNTIES OTHER THAN THE ONE IN WHICH HIS PARTNER IS COUNTY ATTORNEY.

IMPROPER FOR COUNTY ATTORNEY'S FIRM TO REPRESENT PARTY IN CIVIL SUIT ARISING OUT OF PARTY'S PREVIOUS CRIMINAL CONDUCT

Your letter poses three questions based on the fact that a member of your firm is to become County Attorney:

Q. 1. A traffic violation has been disposed of in Justice of the Peace or Traffic Court. Later one of the persons involved therein seeks to employ your firm in a personal injury action arising out of that incident. Can you accept this?

A. On the above set of facts you cannot accept this matter. Your attention is invited to Section 336.5, Code of Iowa, 1971, and to Opinion of the Attorney General 7.23, May, 1962, which interprets it. DR4-101, 5-101 and 5-105, Code of Professional Responsibility for Lawyers

also are pertinent. If the matter did not arise out of the same incident, your concern would, of course, be whether conflict actually did exist under the above provisions of the Code of Professional Responsibility for Lawyers, and DR9-101 prescribing "...Even the appearance of impropriety."

Q. 2. Can you defend criminals in counties other than the one in which your partner is County Attorney?

A. It would be improper for you to do this. A county attorney is "Attorney for the state... in the ... enforcement of the criminal law..." and thus should not engage in undoing the work of another. See Opinions of the Committee of the American Bar Association Nos. 118, 77, 34, 30 and 16 (attached). What a lawyer cannot do his partner cannot do. See Opinions 33 and 49 (attached). DR5-105 and DR9-101 of the Code of Professional Responsibility for Lawyers also are pertinent.

Q. 3. Would it be proper for a lawyer-employee of your firm to request and secure appointment as Magistrate under the "new law"?

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It would be improper. One who shares an office with a Magistrate may not represent persons before the Magistrate. See Opinion 104 (attached). Because the County Attorney has a duty to appear before the Magistrate in certain cases, they should not even office together, much less be associated in a firm. See also DR9-101 of the Code of Professional Responsibility for Lawyers.

The pertinent, old Canons of Professional Ethics and the Opinions under them have been incorporated into the Code of Professional Responsibility for Lawyers by citation, or as Ethical Considerations or directly as Disciplinary Rules. Therefore, where this opinion makes references to Disciplinary Rules, they include the Ethical Considerations and the Citations as well as the Canons out of which they derive.

74-1 April 24, 1974

REPRESENTATION OF PARTY BY CITY ATTORNEY OR ASSOCIATE IS IMPROPER WHERE ADVERSE WITNESSES ARE CITY POLICEMEN

You inquired whether city attorneys and attorneys in their offices may handle court-appointment cases which involve the police force of the City which your firm represents.

It is the opinion of this Committee that it is improper for an attorney to represent an individual wherein one or more of the witnesses adverse to his client are policemen employed by the City whom the attorney for such person also represents. The same would be true if one or more of the witnesses adverse to the client whom the attorney is representing is more than an acquaintance of the attorney. This applies to the other attorneys in the office,

The Iowa Code of Professional Responsibility for Lawyers charges each lawyer with the duty to maintain the respect of the public for the profession and our judicial system. (See EC1-5, EC7-1, EC7-19, EC7-20 and EC7-22). Lawyers are required not only to avoid impropriety, but also to avoid any appearance of impropriety. (See also DR2-101; cf. Nebraska State Bar Association v. Richard, 165 Neb. 80, 84 N.W.2d 136).

Members of the Bar are in a delicate position and must take all affirmative action necessary to assure the public that they are not utilizing a public position or private friendship to further private, professional success. This is impossible if a witness adverse to the present interest of the lawyer's client has a substantial relationship to the lawyer, professional or private, which the public could tend to believe motivated such witness to lessen the impact of his or her testimony.

74-3 September 16, 1974

IMPROPER FOR LAWYER ACTING AS ARBITRATOR OF TENANT-LANDLORD SERVICE TO THEREAFTER REPRESENT ANY OF THE PARTIES INVOLVED IN THE DISPUTE, OR ASSIST NON-LAWYER SERVICE PERSONNEL TO GIVE LEGAL OPINIONS

You requested an opinion concerning your participation as Director of Tenant Landlord Service, and there follows the determination of this Committee concerning the questions you have raised:

1. Pursuant to EC5-20 you may act as an impartial arbitrator or mediator but you may not thereafter represent any of the parties involved in the dispute.

2. A TLS volunteer assisting and receiving complaints and exposing misunderstandings of the law is in the unauthorized practice of the law, and in accordance with DR3-101(A) you cannot assist such non-lawyers in the unauthorized practice of the law.

3. DR2-104 states that a lawyer who has given (unsolicited or through an organization) advice should not accept employment resulting from that advice except in very limited circumstances. One of the exceptions is legal services sponsored by organizations. The Tenant-Landlord Service does not appear within the list of organizations listed in DR2-103(D)(1-4), but if it be so construed, legal representation in a court proceeding would appear to be beyond the purpose and scope of the Service.

Therefore, if there are adjustments which can be made in your participation either as an arbitrator or as representative of students or as representative of landlords, and not in violation of paragraph 2 above, your continuing with TLS would appear proper.

H

74-4 October 24, 1974

COUNTY ATTORNEY OR ASSISTANT COUNTY ATTORNEY MAY NOT REPRESENT A PARTY IN A SUIT AGAINST THE COUNTY OR COUNTY OFFICER

You have inquired whether your firm may accept representation for a youngster and his parents concerning personal injuries sustained by the minor during a demolition derby held at the County Fairgrounds which is owned and operated by the County Agricultural Society in accordance with Chapter 174 of the Code of Iowa, 1973, having in mind that your partner is County Attorney and you are Assistant County Attorney of the County.

On the facts before the Committee as contained in your letter, it is impossible to see whether or not any conflict does exist or can later exist. If the County or any County Office or Officer is involved in any way, you may now have conflict or if some involvement later can develop, conflict also may then develop If you decide there is neither presently any conflict nor any presently foreseeable conflict and accept representation, you
should warn your clients in advance that you will have to withdraw if any conflict develops. You understand that if either of you is involved in conflict, neither of the partners may participate in the litigation.

76-2 February 24, 1976

CONFLICT EXISTS WHERE CITY POLICE OFFICERS ARE PROSECUTING WITNESSES AGAINST CRIMINAL DEFENDANT REPRESENTED BY FIRM WHICH REPRESENTS MAYOR AND CITY COUNCIL.

Your request for opinion has been determined by the Committee as follows:

A. In such an instance, is there a conflict of interest if our firm represents a criminal defendant who was arrested by the city police (who were not acting upon any advice given by us) under a statute violation (not ordinance violation) when the county attorney is the prosecutor?

There is conflict, inasmuch as City Police Officers are prosecuting witnesses, under the direction, indirectly or otherwise, of the Mayor and City Council whom your firm represents.

B. If there is such a conflict of interest, would such conflict be abrogated by a clause in the employment agreement which specifically precludes us from undertaking criminal prosecution on behalf of the city?

The Committee believes the appearance of impropriety and possible conflict make this improper.

C. Do the ethical considerations change if in addition to the foregoing, we act as city prosecutor for the city but the defendant is still charged with a statute violation and the county attorney is prosecutor.

No.

D. Is it relevant that the statute violation may also be a violation of city ordinance, e.g., traffic violations?

No.

It is the relationship of the witnesses to you and its appearance to the public which bears on the question.

76-3 February 24, 1976

IMPROPER FOR LAWYER TO BE EMPLOYED AS LOBBYIST FOR STATE LEGISLATURE WHILE PARTNERS OR ASSOCIATES ARE MEMBERS OF LEGISLATURE

You have requested an opinion as to whether it would be improper for you to become employed as a lobbyist to work with the Legislature of the State of Iowa while two members of your law firm are members of the Legislature and two others are former legislators. You state that it is understood that any income you would derive from lobbying would not be contributed in any way to the law firm and would be kept in a separate personal account.

It is the opinion of the Committee that it would be improper for any member of your firm to work as a lobbyist while any members of the firm are members of the Legislature.

Canon 8 of the Iowa Code of Professional Responsibility for lawyers generally prohibits a lawyer from using his public office for personal gain, or any other lawyer from holding himself out to be in a position to improperly influence a legislator or other p public official, and Canon 9 of the Code prohibits even the appearance of professional impropriety.

It is the opinion of the Committee that even though you would take all steps to avoid impropriety, the general public would say a lawyer-lobbyist attempting to influence his law partners or to obtain from them such dispensation or influence is improper, and would consider that inevitably his partners would benefit from the lobbyist activities.

76-8 October 19, 1976

NOT IMPROPER FOR HUSBAND AND WIFE PRACTICING IN DIFFERENT OFFICES TO REPRESENT OPPOSING INTERESTS, PROVIDED CLIENTS ARE AWARE OF THIS ACCORDING TO FORMAL OPINION 340 OF THE AMERICAN BAR ASSOCIATION.

You are advised that neither this Association nor the Supreme Court of Iowa has entered an opinion concerning the propriety of the representation of differing interests by husband and wife, where both are attorneys, but are not associated

It is the opinion of the Committee that should the question arise in this state, we would probably take the same view as expressed in Formal Opinion 340 entered by the American Bar Association on July 23, 1975, copy of which is enclosed for your information.

76-18 September 28, 1976

IMPROPER FOR LAWYER TO REPRESENT PLAINTIFF IN CIVIL ACTION AGAINST DEFENDANT WHOM HE PREVIOUSLY PROSECUTED SUCCESSFULLY IN A RELATED CRIMINAL PROCEEDING IN MAGISTRATE COURT

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You requested an opinion concerning the propriety of your accepting representation in a civil suit in behalf of a driver injured in a collision in which you previously acted as Special Prosecutor in the County Magistrate's Court against the proposed civil defendant who was charged with a moving violation, the civil action being intended against the same driver whom you successfully prosecuted.

In response thereto the Committee submits the following:

Related law may be found in Section 336.5, Code of Iowa, 1975; State v. Jensen, 178 Iowa 1098, 160 NW 832 (1917); and State v. Weiland, 202 N.W.2d 67 (Iowa 1972), and in Canon 9 of the Iowa Code of Professional Responsibility for Lawyers, particularly EC9-1, EC9-2 and EC9-6.

It is the opinion of the Committee that to accept representation of the plaintiff in the civil action would give the appearance of impropriety and that you should therefore not accept such representation.

76-24 November 4, 1976

COUNTY ATTORNEY AND HIS ASSISTANT MAY REPRESENT ADVERSE PARTIES IN CIVIL SUIT IN COUNTIES WITH LIMITED NUMBER OF LAWYERS, BUT ONLY AFTER CONSENT FORM WAIVER HAS BEEN OBTAINED FROM CLIENTS INVOLVED

The following is submitted in response to your request for an opinion on the propriety of a county attorney and his assistant county attorney representing adverse parties in civil litigation:

Canon 5, DR5-101(A) and DR5-105(A) is relevant. DR2-101(A) proscribes a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial business, property or personal interests. In the present situation, there is obviously a possibility that an assistant county attorney may, in tight situations, consciously or even unconsciously sacrifice his client's interest to better his relationship with his employer. On the other side, a county attorney may consciously or unconsciously use his position to extract a "hard" bargain.

The interjection of the employer-employee relationship into an adversary system can

only be a detrimental variable in the system regardless of the good faith of the participants. Also see DR5-105(A) - a lawyer should refuse employment if the exercise of his independent professional judgment is likely to be adversely affected.

Canon 9 also has a bearing on this problem. The representation of clients by two county attorneys also gives the appearance of impropriety to members of the general public. The public may reasonably view litigation conducted by adversaries who have an employer-employee relationship to be merely one more example of "inside trading". Any practice which re-enforces this belief is contrary to Canon 9 and aids in breeding disrespect for the law.

On the basis of the foregoing, it is the opinion of the Committee that the practice should be condemned However, the public has an interest here, too. In small counties with limited resources, the only way the county can obtain highly skilled legal services within a moderate expenditure of resources is to allow the county attorney and his assistants to maintain a private practice. Necessarily then, in smaller counties, the only practical manner in which this can be implemented is to allow the two attorneys to be adversaries in private litigation.

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To prohibit this practice might lead qualified lawyers to stop seeking county employment and thus force the county to expend more resources to obtain less qualified people. To cause such expenditures of resources to obtain less qualified full time personnel when these resources are so desperately needed in other sectors of the judicial branch would frustrate the public's interest.

While the bar may be able to tolerate the appearance of impropriety for the sake of the public interest, it cannot tolerate possible or actual conflict of interest. Upon examination of Canon 5, many conflict of interest problems can be tolerated with the consent of the client. See DR5-101(A) and DR5-105(A).

Therefore, it is the conclusion of the Committee that this practice be permitted only after the county attorney obtains a signed, written, complete release from his client setting forth specifically the relationship between the attorneys, the pay schedules, time the attorneys have spent or will spend together, other cases which the attorneys are adversaries and a written statement that this relationship does not meet the favor of the bar. Such a signed waiver may help eliminate actual or potential conflicts of interest or at least insure the client is fully aware of the potential conflict. If such waiver is not obtained, the lawyer would be and should be subject to disciplinary proceedings.

Such a result as this has been reached in states similar to Iowa who have faced the same problem. Matter of Farr, 340 N.E.2d 777 (Ind. 1971); Edelman v. Levy, 346 N.Y.S.2d 347 (1973). It should be noted, however, that such a consent form waiver does not relieve the lawyer of his duty to represent his client to the best of his ability, the consent form would alleviate the lawyer of disciplinary action only if the lawyer has, in fact, represented the client competently and faithfully. See In Re Estate of French, 349 N.Y.S.2d 265, 76 Misc. 2d 180 (1973); Matter of Farr, supra.

If one of the private parties should be an agency of any governmental interest, the attorneys should be absolutely prohibited from representing them in a private manner. The potential conflict of interest is so large and the appearance of impropriety so great, no mere waiver or consent by the private client can overcome the potential disrespect such a litigation could cause members of the bar and the legal profession in general.

77-8 May 17, 1977

IMPROPER FOR LAWYER TO SERVE AS BOTH CITY ATTORNEY AND MAGISTRATE

Aside from the Attorney General's ruling to which you refer, you should be informed

that it was the opinion of the Committee that inasmuch as the City which employs you will have an interest in cases which may come before you as Magistrate, there is at least the appearance of impropriety and conflict, and the dual activity on your part would be improper.

You have requested an opinion based on three questions relating to your responsibilities to possible remaindermen who were not notified that they were remainder men in an estate which was closed some years ago.

Under the circumstances disclosed in your letter, the Committee determined that:

1. You have no responsibility to inform the remainder beneficiaries directly, and

2. You do have the responsibility under DR1-103 to report the facts to the Chief Judge of your District, and

3. If any of the remainder beneficiaries thereafter come to you without your having contacted them, you may represent them.

H

78-34 November 21, 1978

LAWYERS REPRESENTING ONE OF FORMER CLIENTS IN LITIGATION BETWEEN THOSE CLIENTS

It appears that your former representation of Client B was in matters entirely unrelated to the matter currently involved, and no confidential disclosures from previous representation would be revealed, relied upon or involved, that Client B was aware of your investigation activity for Client A and thus disclosure thereby has occurred, and Client B has in fact retained other counsel.

On the basis of the foregoing, it is the opinion of the Committee that it would not be improper for you to represent Client A. It is assumed that Client A knows of your former representation of Client B and, if this is not true, full disclosure thereof must be made to Client A with full freedom not to retain you if this makes a difference to Client A.

78-35 November 21, 1978

LAWYER PRACTICING IN CRIMINAL MATTERS IN COUNTY COURTS IN HIS PRIVATE PRACTICE IN CASES OTHER THAN THOSE INVOLVING CHILD SUPPORT ENFORCEMENT IN WHICH HE ACTS AS ASSIST-ANT COUNTY ATTORNEY

You have requested an opinion concerning the propriety of your practicing in criminal matters in your county courts in your private practice in cases other than those involving child support enforcement in which you act as an Assistant County Attorney.

It was the opinion of the Committee that DR5-105 requires a lawyer to decline proferred employment if it would be likely to involve him in representing differing interests. EC9-6 in the last three lines requires a lawyer to strive to avoid not only professional impropriety, but also the appearance of impropriety.

ABA Informal Opinion 1285 distinguishes a situation where the lawyer's public employment is limited and the representation of a private client is in an entirely different area (and thus not likely to involve the lawyer in any conflict). In your situation, it would seem that if you make a full disclosure to private clients and to the Court in each situation, and your public employment is strictly limited to the area of child support enforcement, there would be no

violation of ethical standards in your representation of private clients involved in "criminal, mental health and other aspects of the law". (Excluding, of course, child support matters and representation of parties involved in child support matters).

You should advise each private client in accordance with DR5-105(B) that if any conflict or situation develops which might adversely affect your representation, you would be required to withdraw.

79-8 February 21, 1979

ACCEPTING REPRESENTATION FOLLOWING PRIOR COUNSEL IS PERMISSIBLE UNDER CERTAIN RULES

Your request for an opinion has been received by the Committee.

It was the opinion of the Committee that, assuming your relationship was properly contracted for and the services of Mr. Panek properly terminated, as far as the Iowa Code of Responsibility for Lawyers is concerned, you may proceed with representation of Mr. Palonis. See DR2-110(B)(4).

This Committee, of course, does not know what if anything the Illinois Bar might do in connection with such a matter.

79-13 February 21, 1979

NO ETHICAL QUESTION IN PROPOSED CIVIL REPRESENTATION ARISING INDIRECTLY OUT OF PRIOR CRIMINAL ACTION (BY FORMER COUNTY ATTORNEY) BUT CAUTIONED ABOUT BRODY V. RUBY, 267 N.W.2d 902

Your request for an opinion has been received.

It was the opinion of the Committee that the question raised in your letter does not raise an ethical question provided the law suit is filed in good faith, but you are referred to the case of Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

79-19 February 22, 1979

GENERAL EVALUATION OF 'DIFFERING INTEREST' UNDER IOWA CODE

The Committee has received comment concerning the article which appeared about you in the local paper on January 9, 1979 generally describing your practice and giving your interpretation of certain Canons and the Ethical Considerations and the Disciplinary Rules.

The Committee believes that you do not properly interpret some of the provisions of the Iowa Code of Professional Responsibility for Lawyers, particularly those which refer to conflicts, and urges that you review the definition of a "differing interest" in our Code. Also that you should review DR2-102(C) which prohibits your holding yourselves out as partners unless you are in fact partners (in this connection your particular attention is directed to the January, 1979 issue of the News Bulletin which contains the Committee's latest opinion concerning this subject.) You also should review Ethical Consideration 5-1 to the effect that professional judgment shall be exercised solely for the benefit of the client, and EC5-2, 5-3, 5-4, 5-14, 5-15 and 5-16 which explain some of the ways a lawyer's independent judgment can be compromised.

Your attention also is directed to DR5-104(A) prohibiting business transactions with a client; DR5-105(A) prohibiting employment if the exercise of the lawyer's professional judgment will

likely be affected; DR5-105(D) prohibiting a partner from like representation; and Canon 9, EC9-2 and DR9-101(A) and (B) requiring that even the appearance of impropriety be avoided.

In the opinion of the Committee, the matters referred to in the preceding paragraph prohibit a lawyer from representing two clients with differing interests in the same matter because the lawyer is required to exercise his professional judgment solely for his client's benefit. Professional judgment solely for the benefit of a client is not capable of being divided. The only exception is with the client's consent, after a full disclosure. This kind of disclosure requires a detailed explanation to the client of all possible areas where the interest of one client may differ from that of the other. The burden is upon the lawyer to raise all possibilities. A simple recitation of the applicable law is inadequate. An explanation of the applicable law to every possible factual situation is essential. Knowledge by a client of a family or partner relationship, which may raise a conflict, is inadequate disclosure.

Where Disciplinary Rules prohibit one lawyer from representing a client that representation cannot be undertaken by a partner. The clients of one partner are the clients of all partners or of the partnership. Hence it would only be proper for one partner to represent a private client before a public body represented by the other partner, if the partner representing the public body could, at the same time, represent the private client before that public party.

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From the quotes in the second newspaper article, referred to above, the Committee is led to the conclusion that your concept of a conflict (which really is called a "differing interest" in the Code) is not that concept which the foregoing Ethical Considerations and Disciplinary Rules establish, and that you should therefore give this matter careful consideration.

79-45 July 31, 1979

GENERALLY, AND IN THE ABSENCE OF ACTUAL CONFLICT, ONE MEMBER OF A FIRM AS COUNTY ATTORNEY DOES NOT PRECLUDE THE EMPLOYMENT OF ANOTHER MEMBER OF THE FIRM OR ASSOCIATE OF THE FIRM AS CITY ATTORNEY OR ASSISTANT CITY ATTORNEY

The specific question involved is, 'Is it ethically permissible for one lawyer who is employed upon a part-time basis by the county to practice law, in a partnership, with another lawyer who is employed upon a part-time basis by a city within that county?"

It has long been the opinion of the State Attorney General's office that the offices of county attorney and city attorney are incompatible. See 40 A.G.O. 162 (Rankin) 65 A.G.O. 115 (Scalise); 76 A.G.O. 630 (Turner). Recently, the Attorney General issued an opinion which said that incompatibility of positions does not exist where one partner is county attorney and another is a city attorney. 76 A.G.O. 823 (Turner).

If the conclusion of the Attorney General's office in the first three opinions is accepted as true, i.e., that the two offices in question are incompatible, then the opinion found at 76 A.G.O. 823 cannot be correct.

DR5-105(E) of the Iowa Code of Professional Responsibility for Lawyers states:

> "If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or her firm may accept or continue such employment. (Amended by Court Order February 17, 1978.)"

It is the opinion of the Committee that generally, and in the absence of actual conflict, one member of a firm as county attorney does not preclude the employment of another member of the firm or an associate of the firm as city attorney or assistant city attorney.

The Committee takes notice of the opinions of the Attorney General, but is of the opinion that it must be recognized that there are going to be rural counties where the enforcement of strict or stringent views of this question would mean that some town in the county would be without legal representation or at least without representation of their choice.

The Iowa Code of Professional Responsibility for Lawyers permits lawyers to represent multiple clients if it is obvious that he or she can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. Therefore, it would appear that if the county attorney makes a full disclosure of his firm's arrangements, including possible appointment of an associate or partner as assistant or city attorney, and if the county accepts him or her on this basis, and then if the city attorney does the same thing as far as his clients are concerned, there should be no conflict unless and until one actually arises. If and when conflict does actually arise, one of the lawyers would be required to withdraw from any further representation, and the provisions of DR5-105 require withdrawal of any partner or associate.

79-76 December 20, 1979

CITY OR COUNTY ATTORNEY VS. PRIVATE PRACTICE - IN ABSENCE OF CONFLICT CITY ATTORNEY MAY REPRESENT CRIMINAL DEFENDANTS OUTSIDE THE CITY'S JURISDICTION

You have requested an opinion whether a city attorney, assistant city attorney or an attorney in the law practice with the city attorney is ethically able to represent criminal defendants outside the city's jurisdiction.

It is the opinion of the Committee that in the absence of actual conflict, and as long as the plaintiff involved in the proceedings is not the city and the city's police officers or other city employees are not to be witnesses, there would be no impropriety in such representation.

80-5 January 15, 1980

IN THE ABSENCE OF ACTUAL CONFLICT OR PREJUDICE, THERE WOULD BE NO IMPROPRIETY OF THE ACTION OF A CITY ATTORNEY ACCEPTING REPRESENTATION OF CRIMINAL DEFENDANTS CHARGED WITH COUNTY OR STATE VIOLATIONS PROVIDED THE CITY ATTORNEY'S RELATION-SHIPS ARE DISCLOSED TO ALL PARTIES AND THAT SUCH REPRESENTATION QUESTIONS SHOULD BE DETERMINED ON A CASE BY CASE BASIS BY THE CITY ATTORNEY INVOLVED.

You have requested an opinion as to the propriety of a City Attorney representing criminal defendants charged with county or state violations even where arresting law enforcement officials may have been members of the City Police Department who will testify in such proceedings. In your request you enclosed a copy of an opinion from this Committee dated February 24, 1975 addressed to a City Attorney relating to the same question, and you also pointed out the difficulty encountered in some of the rural counties if this were held to be improper.

The Committee reviewed your request, the attached opinion, and others, as well as the applicable policy concerning part-time judicial magistrates, a copy of which is attached for your information, and the Committee is of the opinion that in the absence of actual conflict or prejudice, there would be no impropriety in the proposed action if the City Attorney's relationships have been fully disclosed to all parties, and that the question should be determined on a case by case basis by the City Attorney involved.

80-17 January 31, 1980

PROPER FOR LAWYER WHO IS A BANK DIRECTOR TO HANDLE AFFAIRS FOR BANK AS A LAWYER

You have requested an opinion as to whether a bank director who is also a lawyer may handle affairs for the bank as a lawyer.

It is the opinion of the Committee that there is no prohibition concerning this; that there are many lawyers representing corporations on whose board they also serve, and based on the question the way you ask it, the Committee believes that is the answer.

80-19 April 17, 1980

COUNTY ATTORNEY REPRESENTING DEFENDANTS FROM OTHER COUNTIES IN OTHER COUNTIES MAY NOT BE IMPROPER

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You have requested an opinion as to whether it would be proper that a member of a law firm which contains the county attorney in your county can represent defendants from other counties in other counties.

It is the opinion of the Committee that in the absence of any actual conflict there would be no impropriety in the above representation. However, the Committee cautions that each case must be judged individually on the question of conflict.

80-32 July 15, 1980

PRACTICE AND CONFLICTS - FATHER MAGISTRATE, SON ASSISTANT COUNTY ATTORNEY

You have reported to the Committee that the father of the person you are considering for the position of assistant county attorney is a part-time magistrate in your county, and both men are currently members of the same law firm. The son (the candidate) works out of a branch office in a different city. As your county has two part-time magistrates, they each have their own court day, one in and one in. Thus, it would be possible for you to divide the duties so that the son would only appear before the other magistrate, and you would handle all matters that arise in his father's court.

You state that the chief judge in your district had stated he would not permit such an arrangement if the two men remain in the same firm but that he could permit it if the son would withdraw from his father's firm and open his own separate office. Both father and son appear to be willing to do so.

You have requested the propriety of this appointment. It is the opinion of the Committee that in the event, as seems probable, the parties separate in their practice, there could be no impropriety providing it is made very certain that the son never appears before the father and that the father never hears a matter in which his son is representing a county attorney's office. Though the Committee has no jurisdiction over judges or magistrates as such, it would appear that Canon 3C(D)(2) would require the father to disqualify himself when his son is acting as a lawyer in any proceeding, and it is assumed he is well aware of this requirement.

The Committee does not see any particular problem in the fact that the father could set cases to be tried before the other magistrate with the order setting trial being sent to all parties which order would show the magistrate's signature as well as the name of the prosecuting

attorney who would be the magistrate's son. This is predicated upon an assumption of facts which might occur because there are two magistrates who may rotate assignments in the county.

The Committee is of the opinion that the son should never appear in his official capacity as an assistant county attorney before his father as he is acting as magistrate.

The Committee has no authority to authorize you to state to the press that you have cleared this in any way with the Committee. However, it seems there would be no reason why you could not say that the question had been researched by you thoroughly and investigated, and that you were satisfied there was no problem involved.

80-33 July 15, 1980

REPRESENTING MALPRACTICE ACTIONS V. DOCTORS ON STAFF OF CLIENT HOSPITAL CONFLICT

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You have requested an opinion predicated upon the following:

Your office for many years has represented the local hospital in your community. From time to time you have had medical malpractice claims against local doctors that are also on the hospital staff. In the past, you have very closely screened potential malpractice claims to determine whether or not the hospital could be involved and, if so, would, of course, turn down the representation. Your question is whether or not there is any unethical conduct on your part in representing the medical malpractice claims against doctors who happen to be on the hospital staff.

It is the opinion of the Committee that providing you exercise much care to determine that there is no involvement of the hospital, there is nothing improper in your representing medical malpractice claims against doctors who happen to be on the hospital staff.

80-47 November 7, 1980

CONFLICT—FIRM CONTINUING TO REPRESENT CLIENT A AS IT HAD IN THE PAST IN LITIGATION AGAINST CLIENT B, ALSO A FORMER REGULAR CLIENT BUT WHO HAD ENGAGED OTHER COUNSEL FOR THE PARTICULAR LITIGATION INVOLVED

You have requested an opinion which, briefly stated, is whether you may represent Client A whom you have represented generally in matters in your area involving A's policyholders in a dispute adverse to Client B whom you are actively representing in totally unrelated matters not currently in litigation. You have informed the Committee that Client B has engaged other counsel.

The Committee is of the opinion that, taking the facts as outlined in paragraphs 1 and 2 of your letter of inquiry dated September 30, 1980 at face value, your firm can in fact accept representation of Client A. Client B must, of course, be advised that the firm has or intends to accept the representation of Client A in the dispute adverse to Client B and that the firm can accept representation of Client A which is not changed whether or not Client B objects to such representation. Client B has already chosen other counsel in the dispute and if, indeed, this dispute is totally unrelated to pending matters which the firm has for Client B, the firm should not be placed in a conflict situation by the fact that Client B has chosen other counsel in the present disputed matter.

The main concern or issue facing the Committee and your firm is the ever present problem of a possible 'appearance of impropriety. There appears to be no problem with appearance of impropriety unless the firm, in fact, has some knowledge, information, etc.

regarding Client B which might adversely affect him in the current litigation.

It does not appear that the firm needs to withdraw from ongoing matters for Client B unless Client B makes that decision on his own inasmuch as a unilateral withdrawal on the part of the firm might well present the "appearance of impropriety' since such withdrawal might cause a delay or additional financial obligations for Client B.

81-6 February 19, 1981

CONFLICT -OPPOSING FIRM MEMBER JOINED COUNSEL FIRM

You have asked for an opinion concerning representation by your firm in a matter in which there might be a possible conflict of interest. The facts as related by you are that the plaintiff brought suit against the defendant for bodily injury and also brought an action before the Industrial Commission claiming he was the employee of the defendant and therefore was entitled to worker's compensation benefits because of his injuries. You were hired by the insurance company to defend the defendant in the civil action. You informed plaintiff to consult other counsel concerning the worker's compensation matter which he did do and, at that time, the civil action was not pursued but the worker's compensation action was. The Industrial Commissioner found an employer-employee relationship which the district court reversed and last fall the plaintiff commenced an appeal to the Supreme Court. One of plaintiff's lawyers thereafter joined your firm, having been responsible for the preparation of the appeal, but he brought none of his files with him to your firm and had not consulted with anyone concerning the matter thereafter. The question is whether your firm may continue representation in the matter.

The Committee was unanimous in its determination that there is the appearance of impropriety in your continuing representation. Though careful consideration was given to the questions of full disclosure, detailed and specific to all the parties concerned with the possibility of consent by any or all of the parties having any effect on this matter, it was the final determination of the Committee that the appearance of impropriety inherent in this matter requires that your firm withdraw from further participation in this case.

81-31 August 28, 1981

POSSIBILITY OF CONFLICT -DEPARTMENT OF TRANSPORTATION OF THE STATE OF IOWA

You have requested an opinion as to whether an attorney who represented the Department of Transportation (DOT) in one action should have been disqualified in a subsequent action in which he represented a plaintiff bringing suit against the DOT. Specifically, a lawyer represented the DOT in an action in which the plaintiff was struck by another car in an area of zero visibility called by operation of a snowblower on the highway. Later, the same attorney brought suit against the state on behalf of a plaintiff who struck another car in an area in which a snowblower was being operated.

The general rule is that an attorney may not represent interests adverse to those of a former client if there is a substantial relationship between the subject of the two representations. Trone v. Smith, 621 F.2d 994 (9th Cir. 1980); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. 265 (S.D. N.Y. 1953); In Formal Opinion 1233, ABA Committee on Ethics and Professional Responsibility, (8124/72); Formal Opinion 342, ABA Committee on Ethics and Professional Responsibility, (11/24/75).

The Iowa Supreme Court has rarely considered this issue. In Kluht v. Mitchell, 199 Iowa 63, 199 NW 294 (1924), the plaintiff brought an action against the defendant for alienation of affections of the plaintiff's wife. The defendant in this action was represented by one

Slaymaker. The plaintiff moved to require Slaymaker to withdraw since the plaintiff had hired Slaymaker to represent him in his divorce proceedings. Kluht, at 294. It was the Plaintiff's understanding that Slaymaker was to represent him against both his wife and defendant Mitchell. However, at the conclusion of the divorce proceedings, Slaymaker did not file suit against the defendant as the plaintiff wished but chose to represent the defendant instead. The Supreme Court reversed the lower court and held that the attorney should have been disqualified. Id.

In State v. Orozco, 202 N.W.2d 344 (Iowa 1972), an attorney, Coonley, had had been appointed by the trial judge to represent the defendant at the arraignment only. Coonley testified that he did not discuss either the facts of the case or the merits of the defense with the defendant but merely ascertained what course of action the defendant wanted to pursue. The defendant requested another attorney. Orozco, at 345. Coonley was then appointed assistant county attorney and appeared for the state against the defendant. Coonley withdrew, however, before the empaneling of the jury. Id. While expressing disapproval of Coonley's actions, the court concluded that there was no prejudice to the defendant requiring reversal of her conviction. Id., at 346.

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Whether or not a substantial relationship exists between an attorney's representations of previous and present clients depends upon the issues involved in the two cases. In Schmidt v. Pine Lawn Memorial Park, Inc., 198 N.W.2d 496 (S.D. 1972), the plaintiffs' predecessor in interest entered into a contract for deed with the defendant. Later, the state commenced condemnation proceedings to acquire a portion of the land covered by the contract.

Mr. Bangs, an attorney, was retained to represent all interested parties in the condemnation proceeding. Schmidt, at 497. Subsequently, Bangs, in his capacity as legal counsel for the defendant, instructed that the payments made to the plaintiffs under the contract for deed be stopped. Thereupon the plaintiffs filed suit for specific performance. Id. The plaintiffs served a motion to disqualify Bangs as counsel for the defendant on the grounds that he had represented them in the condemnation proceedings. The plaintiffs claim that, by interposing a counterclaim for monies obtained for the plaintiffs in the condemnation action, their former attorney was attempting to inflict monetary injury in connection with a matter substantially related to the earlier representation. Id., at 498, 500. The court rejected this argument stating that the two representations were not substantially related. At issue in the present case was the validity of the contract for deed. Id., at 501.

The contract was not material to the condemnation proceeding. It contained no provision concerning the disposition of any condemnation award. No legal or factual issue was raised in the condemnation proceedings concerning the interpretation of validity of the contract for deed. Id.

A substantial relationship was found to exist between two representations in Arkansas v. Dean Foods Products Co., Inc., 605 F.2d 380, (8th Cir. 1979). In that case a law firm represented the defendant corporation in a bankruptcy proceeding. This action involved a study of the defendant's marketing information. Dean Foods, at 382. An integral element in the matter was a charge by the defendant's distributor that the defendant engaged in price fixing. Subsequently, the present antitrust suit was filed. The Eighth Circuit found that the matter was on its fact substantially related to the prior case. Id., at 384.

There seems to be no question that the two actions in the present case are substantially related. The central issue in each is whether the DOT is negligent in its operation of snowblowers.

Inasmuch as it appears that there is a substantial relationship herein involved, the attorney probably should have been disqualified. However, it is the opinion of the Committee that this is a question of fact for the court to decide on a motion to disqualify. This Committee does not review decisions of a trial court ruling on such a motion where there is a right of

appeal to the Supreme Court or the Appellate Court.

81-43 November 24, 1981

LAW FIRM REPRESENTING A PLAINTIFF SUING THE CITY AND THE POWER COMPANY FOR A FAMILY WHOSE CHILD WAS ELECTROCUTED DESPITE THE FACT THAT ONE MEMBER OF THE FIRM IS CITY SOLICITOR INASMUCH AS THE POWER COMPANY HAD AGREED IN WRITING TO INDEMNIFY AND HOLD HARMLESS THE CITY

You have requested an opinion whether your firm can represent plaintiffs in an action for the death of a child arising out of electrocution after the power company, which would be a party defendant, has indemnified the city, which would also become a party defendant, while, at the same time, one of the partners in your firm is city solicitor.

It is the opinion of the Committee that, based on what you have told the Committee in your request for opinion, as long as all are informed and none except, there is nothing wrong in this representation.

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81-44 November 24, 1981

REPRESENTATION OF AIRPLANE PILOT'S ESTATE AND ESTATE OF ACCOMPANYING FORMER CLIENT WITH FULL DISCLOSURE

You have requested an opinion predicated upon the following facts:

Your former partner, piloting an airplane which was involved in an accident, was killed. Also contained in the airplane was his long-time friend and long-time client of your office, who also was killed. Your firm is in the process of probating your partner's estate and has also been requested by the surviving spouse of the deceased client to handle the probate of his estate. Even though you have recommended outside counsel, she refused to go to outside counsel and is very anxious that your firm undertake the necessary probate. She has, in fact, executed an acknowledgment, attached to your request for opinion, which completely and fully explains her rights and her responsibilities which she waives concerning outside counsel and her insistence upon representation by your firm.

Your question is as to the propriety of your representation of both estates.

It is the opinion of the Committee that the full disclosure with acknowledgment signed by the widow and her brother-in-law, allows your firm to undertake administration of the deceased client's estate. Even though your firm is already administering the estate of your partner and even though there is apparent conflict against the partner's estate, it appears to be fully disclosed. In order to avoid future doubts about this position of the possible claim against the estate of your partner, it is believed by the Committee the widow of your former client, in her individual capacity and as executor, should make a report to the court as to the decision which she has reached. She should do this right after consulting independent counsel or she should expressly waive that right. The acknowledgment, of course, clearly contemplates that if any action is filed against your partner's estate, independent counsel will be engaged, and the Committee concurs in this.

83-1 February 14, 1983

CONFLICT - SAME FIRM REPRESENTING DRAM SHOP DEFENDANTS

Your request for an opinion as to whether it would be a conflict of interest for the same

law firm to represent more than one co-defendant tavern in a typical dram shop action in behalf of your Casualty Company came up for consideration before the Committee at its recent hearing-meeting.

It was the determination of the Committee that the law firm which conducted defense for you within Iowa and expressed the opinion that it would be a conflict of interest for the same law firm to represent more than one co-defendant tavern in a typical dram shop action was correct. Therefore, such representation would be improper.

83-5 February 14, 1983

CONFLICT - COUNTY SUPERVISOR PRACTICING LAW

You have requested an opinion as to whether it would be appropriate for you as county supervisor and as a practicing lawyer to represent a client with respect to civil matters in which client was charged with misdemeanors within the county. This matter came up for consideration before the Committee at its recent hearing-meeting.

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It was the determination of the Committee that there would be conflict in such representation and that, furthermore, there would be the appearance of impropriety under Canon 9 of the Iowa Code of Professional Responsibility for Lawyers. Therefore, this representation would not be proper.

83-6 February 14, 1983

CONFLICT - ASSOCIATES AS CONTRACTUAL PUBLIC DEFENDERS

You have requested an opinion whether three lawyers, one of whom is an individual practitioner and two of whom practice together in the same firm, may, as a trio, so to speak, make an arrangement with the county to act as part-time public defenders to be appointed by the county from time to time. This matter came up for consideration by the Committee at its recent hearing-meeting.

It was the determination of the Committee that, under the facts presented in your submission, the arrangement would provide conflict. The specific problem confronting the Committee in this matter arose out of the fact that two of the lawyers were practicing together.

83-13 June 1, 1983

CONFLICT - FORMER ADVERSARY APPEARANCE

You have requested an opinion whether in a dram shop action that has been pending for some time in which opposing counsel's associate or employee appeared in a hearing unopposed and was almost 'pro forma,' you can now hire this particular associate to assist you in your practice dealing with various dram shop actions, one of which is the action referred to. You report that the associate was not privy to the details of any confidential information in the defendant's file and was not aware of any of the factual circumstances, situations or investigations, etc.

After careful consideration, the Committee was of the opinion that this association in this particular litigation would be improper and in violation of Canon 9 of the Iowa Code of Professional Responsibility for Lawyers.

3-26 November 17, 1983

LAWYER AS COUNSEL AND GUARDIAN AD LITEM ALSO CONFLICTS

You have requested an opinion in regard to representation of children in Child in Need Assistance Proceedings, whether or not conflict is prohibitive of the appointment of an attorney to represent the child as well as to act as guardian ad litem.

The Committee is of the opinion that there is no impropriety in the appointment of an attorney to represent the child and to be guardian ad litem unless and until conflict occurs at which time counsel should withdraw from one or the other assignment.

83-27 November 17, 1983

REPRESENTING FORMER CLIENT ETC.

You have requested an opinion concerning your continuing representation of the _____ Community School District and the _____ Area Education Agency.

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After a review of your request for opinion, it was the determination of the Committee at its recent hearing, meeting that unless there were confidential disclosures from your previous representation of AEA that would give you some knowledge, information, etc., regarding the AEA which might adversely affect the AEA in litigation with the school district, there appears to be no ethical prohibition against your continuing representation of the school district. Your attention is invited to the opinions of the Iowa State Bar Association Committee on Professional Ethics and Conduct 78-34 and 80-47.

84-12 July 8, 1985

CONFLICT: CHILD SUPPORT ATTORNEY

Your opinion request concerning whether you may accept court appointments in either criminal or juvenile cases in view of your employment as a part-time assistant county attorney for child support in six counties came on for consideration at the last hearing-meeting of the committee.

It is the opinion of the committee that there would be nothing improper in this activity provided there is full disclosure to all the necessary parties; that you disqualify yourself if there is actual conflict of interest and that you comply with the existing opinions of the committee, copies of which are enclosed herewith.

You also inquired concerning potential problems in case you are appointed a magistrate. It is the understanding of the committee that you were not so appointed and therefore there is no need to respond to this question.

85-8 February 21, 1986

COUNTY ATTORNEY'S FIRM MEMBER DEFENDING CRIMINALS

The committee has reviewed formal Opinion No. 72-7 and 80-19, having to do with lawyers, who are defending criminals and who are members of firms containing county attorney's and has determined that the opinions are not in agreement.

It is therefore the determination of the committee that formal Opinion No. 80-19 be and hereby is rescinded and formal Opinion No. 72-7 shall govern lawyers accepting criminal

defense cases when a county attorney or assistant is a member of that firm.

85-9 February 18, 1986

CITY ATTORNEY - COUNTY ATTORNEY FROM SAME FIRM

You have requested an opinion as to whether it would be ethically permissible for an individual employed on a part time basis as an Assistant County Attorney and who is a partner in the practice of law with the County Attorney, to be employed as a City Attorney.

The committee is of the opinion that, in the absence of actual conflict, it would be ethically permissible for an individual so employed to serve as City Attorney. This is pursuant to the previous opinion of this committee No. 79-45 entered July 1, 1979, which here is confirmed.

87-33 June 10, 1988

CONFLICT - FIRM SCREEN - CHINESE WALL

Your firm is considering the employment of a new associate who is the wife of a department or division head in a state agency which regulates and authorizes, by permit, various activities affecting the public, its business and its government.

This same question was considered by the committee in Formal Opinion 87-7, October 5, 1987.

You now request a reconsidered opinion as to whether this proposed associate could continue practice in her specialty in the divisions of the agency other than her husband's and whether, if she became an associate there would be restrictions on the other members of your firm.

You point out that your request for opinion differs from that presented in 87-7 in that your firm has presented in detail the operation, applicability and considered effectiveness of its existing policy for "screening" lawyers for conflict of interest involvements - sometimes referred to as "Chinese Wall Policy" - including those conflicts which might arise out of familial relationships. You also state that your proposed associate, named in the request, would in no event participate in proceedings involving the specific department or division in which her husband is or would be acting in his present or possibly subsequently more authoritative position. Also you state that it is proposed that she would practice in other divisions of the agency. Also you state that the screening program would permit other members of your firm to practice in various divisions of the agency including his specific department or division, but would effectively screen her from any knowledge, input or participation in the matter at hand.

The use of such a screening procedure was not proposed in the request for Opinion 87-7 and has not heretofore been submitted to the committee. This now is addressed.

Screening is discussed in ABA/BNA Lawyers' Manual on Professional Conduct at page 51:2004

> "Screening is the process through which a disqualified lawyer is isolated from other lawyers in a firm so that the firm can try to avoid disqualification. Some courts have modified the imputed disqualification rule by holding that in some instances the presumption of shared confidences may be rebutted by use of an effective screening mechanism to cordon off the disqualified lawyer, thereby preventing that lawyer from tainting the other members of the law firm. The screening procedure is commonly known as a "Chinese Wall."

and at page 51:2009:

"Screening has been used successfully in this area to prevent the disqualification of entire firms. Use of a Chinese Wall has been said to 'guard against the inadvertent use of confidential information,' Chen v. GAF Corporation, 631 F.2d 1052, 1057 (Ca.2 1980), vacated on jurisdictional grounds, 450 U.S. 903 (1981), and to 'preserve the integrity of the adversary process.' U.S. v. Uzzi, 549 F.Supp. 379, 983 (SDNY 1982), quoting Board of Education v. Nyquist, 590 F.2d, 1241, 1246 (Ca.2 1979)."

and at page 51:2010:

"To determine whether a screen has been effective in preventing a client's secrets and confidences from being shared with the other members of the disqualified lawyer's new firm, courts have considered a number of factors. In addition to the size of the firm and the extent of departmentalization of the firm, other elements to be considered include whether the disqualified lawyer: (1) is able to gain access to the case files; (2) shares in the profits or fees derived from the matter; (3) is able to discuss the lawsuit with any of the members of the firm or the office personal personnel); and (4) is given an opportunity to review any of the case documents. Kovacevic v. Fair Automotive Repair, Inc., 641 F.Supp 237, 254 (NDIll 1986); Manning v. Fort Deposit Bank, 619 F.Supp 1327, 1329 (WDTenn 1985)."

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In your request for opinion you acknowledge that the proposed associate cannot practice in her husband's department or division. The Iowa Code will not permit this. This conforms with Opinion 87-7 and hereby is confirmed.

The committee is of the Opinion that in appropriate situations, with large, departmentalized law firms, and carefully monitored, "screening" policies and procedures can be effective and may, in fact, reinforce the client's right to choose counsel on the basis of judgment and reason, without the negative effect of per se determination of conflict.

The committee is of the opinion that if the established, internal screening policy regarding conflicts of interest, including familial conflicts, as explained in support of your request for this opinion, is precisely carried out and all affected personnel adhere strictly to the expressed restrictions:

1. The employment of the proposed associate would not per se be improper, and

2. The associate could, if operating properly within the limits of the expressed firm policy, practice in departments or divisions of the agency other than those of her husband, and

3. If operating properly within the limits of the expressed firm policy, the other members of the firm could practice before any department or division of the agency, including that of the proposed associate's husband.

The committee does not approve the proposed association of firm personnel or related firm representation except as limited to the facts related by you in your request for opinion and only if there is total compliance, including full disclosure to and consent of the client referred to in paragraph 11 of your April 26, 1988 "facts" statement in your request for opinion.
The committee does not hereby establish a blanket rule applicable in such questions of possible conflicts of interest. Each such incident or proposed relationship must be considered on its own merits.

87-16, 2/12/87

INSURANCE: IN-HOUSE COUNSEL - REPRESENTING INSURED

You have requested an opinion as to whether it is proper for an insurance company to instruct its employee-lawyer to provide the defense to its insured as required under the terms of its liability policy with that insured who has been involved in an accident out of which litigation against him has ensued. You also have inquired whether or not such representation constitutes unauthorized practice of law by the insurance corporation. These questions will be handled separately.

Concerning defense of insured by employee-lawyer of the carrier:

> EC 5-1 provides "the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

The question here concerned involves not only the foregoing EC but the following: 5-2, 5-13, 5-18, 5-21, 5-23, 5-24 and DR 5-107(B) and 5-105(B), all contained in the Iowa Code of Professional Responsibility for Lawyers.

In August 1964 in ABA Informal Opinion C-476, under the old canons and before the Model Code was adopted by the State of Iowa, the ABA Committee on Ethics and Professional Responsibility considered the question whether it would be unethical for an attorney, full time, salaried employee of a corporation to represent fellow employees in their individual legal matters and the opinion began with the following statement:

> "...In answer to your inquiry we assume that these individual legal matters do not in any way involve the corporation or the employee's relationship to it. In such a case a conflict of interest would obviously exist, and Canon 6 would prohibit such dual representation (emphasis added)."

In ABA Informal Opinion 1402 (November 3, 1977) an insurance company which insured architects and engineers for professional liability had made arrangements for in-house counsel to defend its insureds and in an elaborate billing scheme sought to recover part of its fees for their services from the insured. The question raised to the Committee was as to the appropriateness of the billing scheme. The Committee did not respond directly to that question, considering it to be based on the contract which existed between the parties, but went on as follows:

> "...We point out, however, that a lawyer employed by an insurance company to represent and defend an insured, in accordance with the company's contractual obligation, is bound by the same rules of ethics and professional responsibility that would apply if the lawyer were employed directly by the insured.
>
> These include a duty not to undertake or continue a representation if the exercise of the lawyer's professional judgment on behalf of the client is or reasonably may be adversely affected by his other interests or representations, or if it would be likely to involve him in representing differing, conflicting, or inconsistent interests which would adversely affect either his judgment or his loyalty to the client unless the client consents to the representation after full disclosure. Citing DR 5-101(A) and 5-105...A lawyer employed by an insurance company to represent both the insured and the col;company r,lay encounter difficult and conflicting circumstances in meeting these obligations fully, especially when the lawyer is a full time, salaried employee of the company. The essential point of ethics is that the lawyer so employee shall represent the insured as a client with undivided fidelity ... therefore, it is important that the lawyer fully disclose to the client the lawyer's relationship to the insurer, and remain sensitive to any divergence of interests between the insured and the insurer, and at all times act in such fashion that the insured has no basis to believe his interests are not fully and

fairly represented. See Informal Opinion 1310 (1976)."

This committee believes the caveat contained in the above opinion is almost impossible to follow. At such time as conflict might appear after litigation might have been undertaken, even after full disclosures counsel would have to disassociate himself either from the insured or the insurance company. This would not be desirable. "Full disclosure" in the opinion of this committee would not solve the problem of conflict or potential conflict which this committee believes should be avoided.

A lawyer cannot serve two masters. Particularly when the interests of those two masters are or may become devergent. In the question at hand, in-house counsel cannot be expected to separate allegiance to his employer from his allegiance to the insured if he is representing both, and he cannot give allegiance to both if their interests diverge.

On the basis of the foregoing and the review of the above cited provisions of the Iowa Code of Professional Responsibility for lawyers the committee is of the opinion that it is improper for such an employee-lawyer to serve both the insurance company as in-house-lawyer-employee and also to serve as defense lawyer for the insurance company's insured.

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There having been no previous published opinion or rule concerning this question the committee does not believe disciplinary action for past assignment of employed insurance counsel in such circumstances is required by the Committee at this time.

Concerning the question of unauthorized practice of law:

Whether or not the insurance company is engaged in unauthorized practice of the law is a question for the Committee on Unauthorized Practice of the Law or for the Courts, but the ABA Committee on Ethics and Professional Responsibility did peripherally touch on the question in Informal Opinion 973 (August 26, 1967). In considering whether or not there was unauthorized practice of the law by the corporation having its employed counsel assigned also to represent subsidiary corporations, the Committee said:

> "...We believe it is settled that, generally speaking a corporation cannot lawfully supply legal services to any individual or corporate member of the public, and that the presence or absence of monetary compensation or other financial or other profit of advantage is not necessarily determinative of the existence or non-existence of unauthorized practice of law on the part of a corporate or other lay agency person."

Though this committee concurs with the foregoing statement it does not issue an opinion on the question of whether or not such representation constitutes unauthorized practice of the law by the insurance corporation.

88-1 September 8, 1988

CONFLICT: REPRESENTING ONE CLIENT VS ANOTHER

You have requested an opinion, in behalf of your county bar association, whether, under the facts stated in your letter, it was proper for the law firm which had represented a school district for some years to sever that representation so as to represent the child of another of its clients in a personal injury action against that school district.

Representation of the school district in the past included everything other than defense of personal injury actions.

This question is covered by Canon 5 and Canon 9 of the Iowa Code of Professional Responsibility for Lawyers, their Ethical Considerations and Disciplinary Rules.

On the statement of fact it is apparent that representation of one existing client was abandoned in this matter in favor of representation of another.

A client is entitled to a lawyer's undivided loyalty in representation and to freedom from concern that such representation will in no way be diminished by the lawyer's fear or effort to avoid antagonizing the other party (his former client). See ABA/BNA Lawyers Manual , 51:102. On these premises simultaneous representation of adverse clients is proscribed. The only exception occurs when the lawyer reasonably believes the representation of one client is not adversely affected by representation of the other and that both clients consent. Investigation showed no formal consent in this case, merely an acknowledgment that counsel had made its election. The president of the school board made no objection and appeared to accept that decision. But it is true the board had to seek new counsel for matters theretofore handled by the firm, as well as for defense of the personal injury claim. They subsequently used this firm for other matters, such as labor negotiations.

The "appearance of impropriety" is, in the committee's opinion, not even arguable. The is alone, however, does not generally taint an incident so as to constitute impropriety which would support disciplinary action.
There was full disclosure to both clients. The kinds of representations of the two clients by the firm were completely different and both the school board and the firm knew from the insurance company's prior handling of personal injury actions that this firm would not be involved in this one.

The committee is of the opinion that there was no impropriety in this matter.

The committee further is of the opinion that henceforth where full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for continuing representation by counsel.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

88-6 September 9, 1988

CONFLICT: REPRESENTING FIRM, OFFICERS AND OTHERS

You have requested an opinion of the committee as to whether you may accept representation of a former corporate officer against his corporation (also your former client) under circumstances set forth in considerable detail in your request letter. The facts are complicated and rather voluminous and for that reason are not set forth in this opinion.

The committee is of the opinion that under the facts set forth in your request there was such substantial relationship involving your former representation of your corporate client and even, perhaps, its officers and directors, and your proposed representation of the former president-board member in litigation against the corporation so as to make such proposed representation improper pursuant to Disciplinary Rule 5-105 and pertinent Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers.

The complexity of your involvement in the affairs of the corporate client and in the activities of its officers and directors and even its involvement with third parties also gives such proposed representation the appearance of impropriety under Canon 9 of the above disciplinary Code.

While full disclosure and express consent of all parties sometimes can resolve conflict, that is not a consideration in this opinion, because your statement of facts indicates that the

present counsel of your former corporate client have twice questioned your proposed representation.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

88-7 December 16, 1988

CONFLICT: REPRESENTING ONE CLIENT VS ANOTHER

You and your firm have represented as defendant the principal owner and his construction company in a foreclosure by a bank, also as plaintiff in a third-party action against another corporation. Your clients then joined in a direct action against the third-party defendant upon which judgment was obtained and upheld on appeal. Involved in that action as part of its subject matter was real estate owned by your partner and sold on contract to your client. The holder of the judgment, your client, has made assignments of his judgment to (1) your firm for legal services, (2) your partner covering your client's unpaid balance on the real estate contract and (3) to businesses, others, including relatives, etc. All are duly filed of record. The bank has attacked the judgment pursuant to a separate foreclosure action and now the validity of each of the assignments has been put in question.

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You ask three questions:

Question 1 - "Can this firm represent ourselves with reference to our own fee agreement and assignment of judgment for expenses?"

Answer: The committee is of the opinion that this is not improper.

Question 2 - "Can we represent any or all of the assignment of judgment holders described in subparagraphs 4 and 5, supra?"

Answer: The committee is of the opinion that the various assignees have adversary interests against one another. Therefore the committee is of the opinion that your firm can only represent your firm as assignee.

Question 3 - "_____ and wife will obtain other counsel to represent their personal and individual interest under the real estate contract."

Answer: The committee is of the opinion that this is proper and necessary.

88-12 December 19, 1988

COUNTY ATTORNEY: SISTER OF SOLE PRACTITIONER

You practice alone. Your father practices in the same county alone, not in your community. Now your sister, also a sole practitioner, living in another community has been named county attorney.

You request an opinion whether you automatically have a conflict if you continue to accept criminal defense work.

Enclosed herewith are copies of related opinions 67-4, 76-8 and 80-32 by this committee, and Formal Opinion 340 of the American Bar Association Committee an Professional Ethics.

The committee is of the opinion that though most opinions concerning representations by relatives deal with husband and wife representations the reasoning in the opinions ordinarily

would not infer or imply automatic conflict in the representations you mention. Of course if actual conflict arises you would need to withdraw or make full disclosure and meet the conflict on a basis consented to by all parties.

Your prior disclosure of your relationship to prospective clients should meet ethical requirements in the absence of actual conflict.
The committee further is of the opinion that where, as here, full disclosure and consent are to be relied an to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

This is opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

In view of the provisions of the Iowa Code of Professional Responsibility for Lawyers after Opinion 67-4 and the changes therein contained, Formal Opinion 67-4 hereby is rescinded.

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88-14 January 12, 1989

CONFLICT: IN-HOUSE INSURANCE COUNSEL REPRESENTING INSUREDS—MODIFICATION OF 87-16

You have requested the committee to reconsider its Formal Opinion 87-16, February 12, 1988. You were joined in this request by the_____ Association. You both have submitted briefs and arguments which have been considered by the committee.

Contrary to assertions contained in briefs and arguments, the committee understands and believes that in-house counsel are able to recognize and deal with actual conflict when it arises and the committee has made and makes no presumptions that in-house counsel will use knowledge of confidential client information in a subsequent action brought by the insurer against the insured. these questions are not in issue.

The committee's primary concern is with the potential damage visited upon a client when faced with loss of counsel, down the road, in the process of representation when the parties actually are faced with acknowledged conflict. Particularly is this a concern when, in fact, it can so simply be avoided.

There is no question concerning the responsibility of counsel to represent the insured with undivided loyalty once such representation is assumed. See, for example, ABA/BNA 51:308:

> "A lawyer hired or employed by an insurance company to represent an insured must represent the insured as his client with undivided loyalty. See Philadelphia Bar Opinion 86-108 (2/9/87). See also ABA Formal Opinion 282 (May 27, 1950); R. Mallen & V. Levit, Legal Malpractice 263 (1977); Brodsky, Duty of Attorney Appointed by Liability Insurance Company, 14 Clev.-Mar. L. Rev. 375 (1965); Keeton, Liability Insurance and -Responsibility for Settlement, 67 Harv. L. Rev. 1136 (1954); Roos, The Obligation to Defend and Some Related Problems, 13 Hastings L.J. 206 (1961); Stern, Dilemmas for Insurance Counsel - Coping with Conflicts of Interest, 65 Mass. L. Rev. 127 (1980); Carpenter & Williamson, Open Forum - Conflict of Interest Problems in Insurance--Practice, 37 Ins. Couns. J. 4997 (1970). See also Hawkins v. State Bar, 23 Cal.3d 622, 591 P.2d 524, 153 Cal.Rptr 234 (1979); Wong v. Fong, 60 Hawaii 601, 593, P.2d

386 (1979); Shelby Mutual Insurance Co., v. Kleman, 255 N.W.2d 231 (Minn 1977).

> 'Problems arise when a course of action would be beneficial to the client-insured, but would be detrimental to the insurer that employs or pays the lawyer. E.G., Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill.App.3d 467, 392 N.E.2d 1365 (1979), aff'd 81 Ill.2d 201, 407 N.E.2d 47 (1980). Where a conflict arises between an insured and the insurer, the lawyer may not continue with the dual representation. See Lieberman v. Employers Insurance, 171 N.J.Super, 39, 407 A.2d 1256 (App.Div. 1979), modified and remanded, 84 NJ 325, 419 A.2d 417 (1980)."

The committee has considered various examples of potential conflict which can arise for in-house counsel designated to represent insureds. When counsel is the in-house employee of the company and not an outside, independent lawyer, the appearance of impropriety, proscribed by Canon 9, is a serious potential problem.

To meet this problem and all other possible conflicts would require either a rewriting of the insurance company's policies ox written specific waiver of all potential conflicts given to the insured at the time in-house counsel assumes such representation.

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Your recognition of one potential conflict by guaranteeing to the insured that any recovery over policy limits "would be" (your language) assumed by the insurer indicates recognition of one inherent, potential conflict. But there are others

Predicated upon the foregoing and under the provisions of the Iowa Code of Professional Responsibility for Lawyers, the committee is of the opinion that its Formal Opinion 87-16, February 12, 1988 should be and it is modified by adding the following:

It is not improper for employed, in-house counsel of the insurer to represent the insured if:

> Prior to commencement of such representation the insurer executes a written agreement with the insured:
>
> 1) Guaranteeing that insurer will raise no objection to coverage of insured, and,
> 2) The insurer will not invoke any defenses in insurer's behalf against the insured, and
> 3) The insurer will assume insured's full financial responsibility including "over limits" recovery if any, and,
> 4) The insurer will agree that its employed in-house counsel may prosecute the rights of the insured against all parties, if desired by insured and upon terms agreed to between counsel and insured, and,
> 5) The insurer will make available insured's files to the insured upon written demand.

Caveat: The committee is of the opinion that both this and Formal Opinion 87-16 are directed only to the question of whether it is ethical for in-house-counsel to represent the insureds of counsels' employer. The question of whether such employment results in the insurer-employer illegally being engaged in the practice of law is not addressed except for the pertinent-reference--language in Formal Opinion 87-16. The legality or propriety of the contemplated in-house-counsel representation of insureds should be determined either by the Committee on Unauthorized Practice of Law if it has jurisdiction, or by the courts, before such in-house-counsel representation is undertaken, because if it is illegal it also is unethical for counsel to participate.

88-28 June 8, 1989

CONFLICT: SUING EXISTING CLIENT

You have represented a father and mother and also their son-in-law from time to time. You consider them clients. The father and mother requested the son-in-law to do some clean up work on their premises after a tornado and furnished faulty equipment to him and in its use he was injured. He was not negligent. He wants you to represent him in litigation against the father and mother and they want you to represent him. You request an opinion as to the propriety of such representation.

Ethical Considerations EC 5-14, 15, 16 and 17, and DR 5-105 of the Iowa Code of Professional Responsibility for Lawyers are pertinent. Generally a lawyer may not represent any client whose interests are adverse to an existing client even on separate and distinct matters unless it is obvious that representation of the new client will not harm the representation of the other or the new representation is so limited that the lawyer reasonably believes it will not adversely limit the first client. Some jurisdictions provide, however, that if both parties consent in writing to such representation, after full prior disclosure, it is not improper, ABA/BNA--Lawyers Manual on Professional Conduct 51:101 et seq.
The rationale for the prohibition is stated at page 51:102, supra:

> " The prohibition against simultaneous representation of adverse interests is based on two considerations. First, courts have expressed concern that the vigor of the lawyer's representation of one client may be diminished in an effort to avoid antagonizing the other client. See, e.g., International Business Machines Corp. v. Levin, 579 F.2d 271, 280 (Ca.3 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (Ca 2 1976). The second consideration relates to the client's expectation of receiving the undivided loyalty of the lawyer. In Jeffry v. Pounds, 67 Cal.App 3d 6, 9, 136 Cal.Rptr. 373, 376 (1977), for example, the court stated that '[a] lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter.'"

EC 5-16 of the Iowa Code of Professional Responsibility for Lawyers states:

> "In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

Also you are referred to Committee Formal Opinion 79-19 (1979) concerning "differing interests."

Under the facts as reported to the Committee in this matter, it is the opinion of the Committee that if both parties consent in writing to your representation of them after full disclosure there would be no ethical impropriety in your representing the "son-in-law' vs. the "mother and father", even though such litigation may indeed develop controversy and adversary relations between the parties and, consequently between them and you.

The committee further is of the opinion that where, as here, full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

This opinion applies only to the facts involved in this request for opinion. Each question

of conflict must be determined upon its own merits.

89-5 September 6, 1989

SPEAKER: SPEAKER'S BUREAU

You have requested an opinion as to the propriety of extending written invitations to local civic organizations offering the firm's existing "speakers bureau" on various legal topics.

It is the opinion of the committee that as long as there is no in-person solicitation by your firm's speakers, which is prohibited by DR 2-101 (B)(4)(a), it would not be improper. me provisions of DR 2-104(A), particularly subparagraph (4) must be followed.

89-6 September 6, 1989

DR 2-101(B)(3): INTERPRETATION - LAW FIRM LISTING

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You have requested an opinion as to the construction of the new language in DR 2-101(B)(3), "a law f whose lawyers are licensed to practice law in Iowa. . ."
It is the opinion of the committee that the former language, which was retained in DR 2-102(D), ". . . a may not be used in Iowa unless all those named are or, if deceased, were members of the bar in I mandated a corresponding provision, in DR 2-101(B)(3) and that the first paragraph of DR 2-101(B)(construed as if it read:

> "(3) Law Firm Telephone and City Directory Listings. A law firm, all of whose lawyers named in the firm name are or, if deceased, were licensed to practice law in Iowa, may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements."

89-7 September 6, 1989

CONFLICT: CITY ATTORNEY AND COUNCILMAN, SAME FIRM

A member of your firm is city attorney and another, new firm member is a member of the city council.

You ask whether this gives rise to an ethical conflict if the councilman excuses himself from any council decisions involving the hiring of a city attorney and the approval of city attorney bills.

It is the opinion of the committee that except in particular instances where actual conflict of interest might occur, requiring withdrawal of one or the other or both lawyers of your firm, there would be no impropriety in the two lawyers of your firm fulfilling their responsibilities to the city, in the manner proposed.

89-31 December 11, 1989

CONFLICT: LAWYER WIFE OF POLICE CHIEF

You state that:

'The wife of the Chief of Police in recently received her license to practice law in the State of Iowa. Effective November 1, 1989, she is to be employed by the firm of Iowa. m is firm, through and take court appointments on criminal cases."

You then ask:

'Is there a conflict of interest? Can the subject in question take court appointments? If the subject in question does take court appointments, how does this affect the firm?"

It is the opinion of the committee that it would be improper for counsel to represent parties to any litigation in which her husband or members of his department are parties or may be witnesses. Canon 5 of the Iowa Code of Professional Responsibility for Lawyers and EC 5-21 address avoidance of influences which may affect the judgment of counsel. Canon 9 proscribes even the appearance of impropriety. Both are involved here. This impropriety also would apply to the other members of the law firm. (&c DR 5-105(E), Iowa Code of Professional Responsibility for Lawyers.)

However, if there is full disclosure of her relationship and consent by all parties and counsel, such representation would not be improper unless
there were actual conflict.

The committee further is of the opinion that where, as here, full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

89-34 December 11, 1989

CONFLICT: FORMER INSURER EMPLOYER

As a former employee of an insurance carrier you supervised assigning claims to counsel and monitoring files to conclusion. Now you are partner in a law firm which has a claim against such carrier. You state you did not work on the file but know that there is coverage in this case and know its limits and have no other knowledge about the case.

You ask the propriety of your continuing in representation of this insured in this action.

For the purpose of this opinion it is assumed that the foregoing facts are true - deviation might change the opinion. It is thus assumed that you have received no confidential information concerning present litigation out of your previous employment.

Appropriate discovery would disclose all you knew - that there is insurance coverage and its amount.

On the basis of the foregoing it is the opinion of the committee that there would be no violation of confidences under DR 4-101 of the Iowa Code of Professional Responsibility for Lawyers and its Ethical Considerations and that absent any other possible conflict not made known to the committee there would be no impropriety in your proposed continuing representation.

This opinion also is supported by Formal Opinion 86-11, November 18, 1986.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

89-40 February 20, 1990

CONFLICT: ABSTRACT OPINION AND CLOSING, BUYER AND SELLER

Your firm represents a credit union and has done title opinions for it and has closed its loans in your office, having prepared all necessary documentation. Your firm has directed the title opinion to the credit union and its member-borrower. After closing you furnish a second opinion to the credit union.

Now the employer of the member-borrowers has entered a prepaid legal services agreement with a law firm which seeks to engage your firm as lawyers for the member-borrowers in your area.

You inquire as to the propriety of your firm continuing to examine the abstracts and furnish title opinions to both the credit union-lender and the member-borrower.

Canon 5 of the Iowa Code of Professional Responsibility for Lawyers, EC 5-14, 15 and 16 and DR 5-105 are involved.

Under this arrangement the employee-borrower is depending on your title opinion. If adverse interests develop you can not protect both parties. And at the loan closing the borrower, who is unrepresented, enters into an agreement adverse to the lender. The committee believes you can nat serve two masters. Even under the past arrangement your client, the credit union would look to your firm for representation, to the exclusion of the employee-borrower.

The prepaid legal services law firm represents the employees who are the borrowers. If your firm becomes local alter-ego for that law firm it becomes the legal representative of the employees. Your firm would be representing the lender and the borrower - which would be improper, in the opinion of the committee.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its awn merits.

89-43 February 20, 1990

CONFLICT: ADVERSE PARTIES

A member of your firm represented an "adoptive mother" in a personal injury action years ago, and over the years, from time to time served her in other minor matters. She now is deceased. Apparently her "son" was formally adapted although this has not been formally confirmed. A member of your firm now represents him as an adult in litigation against the State of Iowa for past failure to fulfill possible duty to him as a child with extraordinary needs.

Now the "son" has joined other heirs in a completely separate will contest and they are represented by other counsel. A member of your firm is counsel for the executrix of that estate. m us a member of your firm represents the son in a civil action and another member represents the executrix-adversary to the son.

You request a determination whether there is a proper way to continue the lawyers' and the firm's present representation.

DR 5-105(A)(C) and (D) and pertinent Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers are involved. me ABA/BNA Lawyer's Manual on

Professional Conduct, at 51:101 and 102, includes these statements:

> 'A lawyer may not represent any person whose interests are adverse to those of an existing client even when the matters are separate and distinct, unless both clients consent after consultation and it is obvious that the lawyer's representation of the new client will not harm the representation of the other client.
> 'Similarly, a lawyer may not represent a client if the representation may be materially limited by the lawyer's responsibilities to a second client, unless the lawyer reasonably believes the representation of the first client will not be adversely affected, and the first client consents after consultation. * * *
>
> "The prohibition against simultaneous representation of adverse interests is based on two considerations. First, courts have expressed concern that the vigor of the lawyer's representation of one client may be diminished in an effort to avoid antagonizing the other client. See, e.g., International Business Machines Corp. v. Levin, 579 F.2d 271, 280 (Ca 3 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (Ca 2 1976). m e second consideration relates to the client's expectation of receiving the undivided loyalty of the lawyer. In Jeffry v. Pounds, 67 Cal App.3d 6, 9, 136 Cal.Rptr 373, 376 (1977), for example, the court stated that '[a] lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter.' ABA Committee on Ethics and Professional Responsibility expressed the same concern in AEA Informal Opinion 1495 (12/9/82), stating that "[l]oyalty is an indispensable element of a lawyer's relationship with a client." See also Fund of Funds v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (Ca.2 1977) (client has absolute right to firm's undivided loyalty')."

The committee believes there is a distinction between the two representations involved here. may are so different that there is no relationship between them and nothing is apparent in either case which would affect counsels' decisions in the other.

It is the opinion of the committee that though technically there may be adversary representation, your lawyers and the firm could continue present representation if full disclosure is made to all parties and they all consent in writing.

The committee further is of the opinion that where, as here, full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

If such consent is nat possible it is the opinion of the Committee that your firm must withdraw from one of these representations.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

89-45 February 20, 1990

CONFLICT: CONSERVATORSHIPS

You ask:

"Is there a conflict of interest for a firm to undertake representation of the conservator in preparing the documents necessary to terminate the conservatorship where the firm has previously prepared documents necessary to consummate the final settlement of the personal injury claim and obtained the necessary court orders approving the settlement and establishing the conservatorship at the request of the insurance company that negotiated the settlement?"

It is the opinion of the Committee that the transaction consummation, the final settlement and obtaining the necessary Court orders involving creation of the conservatorship ended when the conservator was appointed and the interest of the insurance company in the whole matter also became ended. Therefore the termination of the conservatorship does not involve the insurance company and no conflict exists. Representation of the conservator in this matter would not be improper.

89-51 May 14, 1990

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CONFLICT: CITY AND COUNTY ATTORNEY CONCURRENTLY

You inquire whether it would be proper for you to be employed part-time as County Attorney and concurrently serve as City Attorney in your private practice.
In Formal Opinion 79-45, July 31, 1979, this committee stated:

"It is the opinion of the Committee that generally, and in the absence of actual conflict, one member of a firm as county attorney does not preclude the employment of another member of the firm or an associate of the firm as city attorney or assistant city attorney.

"The Committee takes notice of the opinions of the Attorney General, but is of the opinion that it must be recognized that there are going to be rural counties where the enforcement of strict or stringent views of this question would mean that some town in the county would be without legal representation or at least without representation of their choice.

The Iowa Code of Professional Responsibility for Lawyers permits lawyers to represent multiple clients if it is obvious that he or she can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. Therefore, it would appear that if the county attorney makes a full disclosure of his firm's arrangements, including possible appointment of an associate or partner as assistant or city attorney, and if the county accepts him or her on this basis, and then if the city attorney does the same thing as far as his clients are concerned, there should be no conflict unless and until one actually arises. If and when conflict does actually arise, one of the lawyers would be required to withdraw from any further representation, and the provisions of DR 5-105 require withdrawal of any partner or associate.
m is was confirmed in Formal Opinion 85-9, February 18, 1986.

It is the opinion of the committee that the same rationale applies to one member of a law firm and that in the absence of actual conflict such representation would not be improper, provided full disclosure is made.

The committee further is of the opinion that where, as here, full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

If actual conflict does occur counsel could represent neither the city nor the county.

89-52 May 11, 1990

CONFLICT: FORMER MAGISTRATE REPRESENTING FORMER DEFENDANT - BEFORE HIM

You state that in your capacity as a part-time judicial magistrate in County, an individual was brought before you for initial appearance as required by Iowa Rule of Criminal Procedure 2 and that you explained his Miranda rights, set bond and appointed counsel (who was present at the appearance), made preliminary finding of probable cause required by the rule and then completed and filed the standard initial appearance form. The defendant eventually proceeded to trial, was convicted of first degree murder and now seeks to appeal. He has requested that you represent him on appeal. You request whether this is proper.

EC 9-3 of the Iowa Code of Professional Responsibility for Lawyers states:

> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

DR 9-101(B) provides:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Accordingly it is the opinion of the Committee that your representation of the proposed client appeal would be improper.

90-1 July 9, 1990

Living Trusts

You have requested an opinion concerning participation by your law firm in legal representation connected with marketing of so-called "living trusts" by an estate planning concern (Concern), in this case formed by a group of insurance agents. You have submitted five "forms" or "plans" of representation.

In all plans:

1. The estate planning Concern promotes the use of a living trust, pour-over will, durable power of attorney, and health care durable power of attorney.

2. The necessary forms, instructions, etc. offered by the Concern are or were prepared by your firm.

3. The Concern is to inform its customers it is not engaged in the practice of law, that they should engage counsel and that the forms might need modification.

The Concern would offer, circulate, distribute and sell through its agents various documents, instruments and other materials and information written and/or in person and give advice as to their use and effect in the creation of legal documents intended to create or re-create legal interests in property, to dispose of real and personal property, to create or modify trusts, to affect or avoid probate, to affect federal and state tax liability and in other ways to determine, establish or amend legal rights of its customers. The committee is of the opinion that this constitutes the practice of law as defined in Supreme Court Rules 121(i)(4) and 123.7 and in Bump v. District Court of Polk County, 5 NW 2d 914 (1942); Committee v. Gartin, 272 NW 2d 485, (1978). See also People v. Schmidt, 251 Pac 2d 915 (Colo. 1952) and State v. Schmitt, 258 P 2d 228 (Kansas 1953).

References to Ethical Considerations (EC) and Disciplinary Rules (DR) are to the Iowa Code of Professional Responsibility for Lawyers.

Canon 3 - In each of the plans submitted your firm would be counsel and do the legal work for the Concern. It is the opinion of the committee that in each plan your firm therefore would be aiding and participating in unauthorized practice of law in violation of EC 3-1, 3-2, 3-3, 3-4, 3-5 and 3-8 and in violation of DR 3-101(A) and DR 3-103(A).

Attention now is directed to the five individual plans, which differ from one another:

Plan I

The major differing characteristics are:

1. Your firm would represent Concern on an hourly or salaried basis.

2. Your firm also would provide general legal advice to firms' customers, paid for by Concern.

Canon 2 - Inherent in the plan is the referral and recommendation of your firm for legal or advisory services. This particularly is true where Concern's customers do not engage independent counsel. Your firms' commitment to the Concern's interests and the Concern's commitment to those of your firm permeate the relationship. It is the opinion of the committee that the referral commitments and inevitable occurrences of referral to your firm are in violation of EC 2-9 and DR 2-103(A)(B)(C) and (D).

Canon 5 - In the absence of Concern's customer engaging separate counsel, that customer would be relying on the documentation, instructions and advice of your firm, which also would be representing the Concern. It is the opinion of the committee that your firm would have actual or potential conflict or differing interests in violation of EC 5-1, 5-2, 5-14, 5-15, 5-21 and 5-23 and in violation of DR 5-105(C).

Canon 7 - Lay persons are best served by their own counsel. For this reason lawyers must not advise unrepresented persons but "may advise them to obtain a lawyer". In the absence of Concern's customers having counsel any legal advice by your firm other than advising them to obtain a lawyer, would be in violation of EC 7-18 and DR 7-104(A)(2).

Plan II

The major differing characteristics are:

1. Your firm would be employed by Concern to represent its customers on a "client-by-client basis" if they choose not to employ separate counsel.

2. Concern would pay your firm on a flat fee basis.

3. Your firm would limit services and this would be disclosed to Concern's customers.

Canons: 2,3,5,7 The opinions of the committee concerning Plan I as to Canons 2, 3, 5 and 7 are the opinions of the committee concerning Plan II, and, in addition, it is the opinion of the committee that the "flat fee" provision in this plan is improperly limiting on the legal services available to Concern's customers using your firms' services and is in violation of DR 5-107(B) and Committee Formal Opinion 86-13, Feb. 11, 1987 and 89-20, Dec. 4, 1989.

Canons: 5,6

Plan III

The major differing characteristics are:

1. Your firm would review the material executed by Concern's customers and advise Concern who then would advise its customers.

2. "Flat fee" payment by Concern.

Canons: 2,3,5,7

The opinions of the committee concerning Plan I and Plan II as to Canons 2, 3, 5 and 7 and the committee's Formal Opinions 86-13 and 89-20 are the opinion of the committee concerning Plan III and, in addition, by your firm's advising Concern "whether forms are properly completed and executed . . . and any necessary or recommended changes . . ." it would be implicit that this advice would be passed on to Concern's customers by Concern and thus indirectly your firm would be representing them; it is the opinion of the committee that this would be in violation of EC 7-18, DR 7-104(A)(2) and, concurrently, EC 1-5 and DR 1-102(A)(2).

Canons: 7,1

H

Plan IV

The major differing characteristics are:

1. Concern would furnish material to its customers with a "non-exclusive" list of lawyers available at a "set fee", including your firm, which would be recommended if another were not chosen. You would then represent Concern's customers.

Canons: 2,3,5,7, 1,6

The opinions of the committee concerning Plans I, II and III as to Canons 2, 3 and 5, 7 and 1 and committee Formal Opinions 86-13 and 89-20 are the opinion of the committee concerning Plan IV. It is the opinion of the committee that this Plan simply is a disguised referral system with the inherent improprieties of the preceding plans.

Plan V

The major differing characteristics are:

1. Concern holds seminars in which your firm would participate.

2. Your firms' employment by the Concern would be publicized.

3. You would accept representation of Concern's customers for "living trust" purposes.

4. Concern would no longer be involved unless requested by its customers.

Canons: 2,5,7,1

The opinions of the committee concerning Plans I, II, III and IV as to Canons 2, 5, 7 and 1 are the opinions of the committee concerning Plan V.

Participation by Iowa lawyers in these "living trust" programs, by whatever name, functioning in the manner herein concerned is improper, in the opinion of the committee.

90-6 August 23, 1990

ABSTRACTING: OPINIONS TO BOTH PARTIES

You inquire whether Committee Formal Opinion 89-40 prevents furnishing a title opinion to both purchaser and seller of real estate.

It is the opinion of the committee that furnishing a copy of the opinion to both buyer and seller is not improper as long as it is clear to all parties that your client is the person or entity who or which engaged you and pays for the examination. You should recommend to the other party (who, from your letter appears usually to be the buyer) that he or she should consult counsel concerning the title opinion as well as the whole transaction.

H

90-13 August 23, 1990

CONFLICT: CITY ATTORNEY, HUSBAND - OTHER FIRM, WIFE

You are the full-time city attorney for your community. You furnish legal services to and represent the city council and the various city boards and commissions. Your wife has become associated with a local law firm which from time to time represents clients in dealings with your city clients.

Her firm is very careful not to involve her in any of these representations. She has no personal knowledge concerning them and is excluded from involvement of any kind.

You ask four questions concerning this situation.

H

The matter is governed by EC 4-1, 4-2, 4-5 and DR 4-101 and by EC 5-1, 5-2 and DR 5-101(A) and 5-105(B) and (E) of the Iowa Code of Professional Responsibility for Lawyers.

ABA Formal Opinion 340 (1974) dealt with this question of husband and wife practice. It has not been modified by any ABA opinions and has been cited, for instance, see Commission v. Sears, 504 F.S. 241 (Ill. 1980) at pages 267 and 268. This committee has issued an opinion in support of its rationale, Formal Opinion 76-8, October 1976. ABA Opinion states, in part:

> "It is not necessarily improper for husband-and-wife lawyers who are practicing in different offices or firms to represent differing interests. No disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation. Likewise, it is not necessarily improper for a law firm having a married partner or associate to represent clients whose interests are opposed to those of other clients represented by another law firm with which the married lawyer's spouse is associated as a lawyer. . . . Yet it also must be recognized that the relationship of husband and wife is so close that the possibility of an inadvertent breach of a confidence or the unavoidable receipt of information concerning the client by the spouse other than the one who represents the client (for example, information contained in a telephoned message left for the lawyer at home) is substantial. Because of the closeness of the husband-and-wife relationship, a lawyer who is married to a lawyer must be particularly careful to observe the suggestions and requirements of EC 4-1, EC 4-5, EC 5-1, EC 5-2, EC 5-3, EC 5-7, DR 4-101, and DR 5-101.
>
> "Even though the representation by husband and wife of opposing parties is not a violation of any disciplinary rule, the possibility of a violation of DR 5-101, in particular, is real and must be carefully considered in each instance. If the interest of one of the marriage partners as attorney for an opposing party creates a financial or personal interest that reasonably might affect the ability of a lawyer to

represent fully his or her client with undivided loyalty and free exercise of professional judgment, the employment must be declined. We cannot assume, however, that certain facts, such as a fee being contingent or varying according to results obtained, necessarily will involve a violation of DR 5-101(A). In some instances the interest of one spouse in the other's income resulting from a particular fee may be such that professional judgment may be affected, while in other situations it may not be; the existence of such interest is a fact determination to be made in each individual case. Wherever one spouse is disqualified under DR 5-101(A), the entire firm is disqualified under DR 5-105(D)."

"In any event, the advice contained in EC 5-3 and EC 5-16 is appropos; the lawyer should advise the client of all circumstances that might cause one to question the undivided loyalty of the law firm and let the client make the decision as to its employment. If the client prefers not to employ a law firm containing a lawyer whose spouse is associated with a firm representing an opposing party, that decision should be respected. . . . Accordingly, we conclude that a law firm employing a lawyer whose spouse is a lawyer associated with another local law firm need not fear consistent or mandatory disqualification when the two firms represent opposing interests; yet it is both proper and necessary for the firm always to be sensitive to both the possibility of disqualification and the wishes of its clients. Marriage partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship."

The committee agrees with the foregoing rationale and is of the opinion that such separate practice by husband and wife does not necessarily create or imply conflict or impropriety nor does it necessarily engender mandatory disqualification when they or their firms represent opposing interests. The committee is of the opinion that the firm should make full disclosure of this marriage relationship to its clients or proposed clients and obtain consent for representation before representation is undertaken.

The committee answers your specific questions, subject to the foregoing:

1. Question: "Does our marriage create an actual conflict of interest, or an appearance of one, sufficient to absolutely disqualify all of the firm partners from representing any client in contract negotiations with the City or any client before the _____ City Council, Planning and Zoning Commission, Board of Adjustment, or any other City board, commission, administrative agency or office?"

   Answer: No.

2. Question: "If so, will any measures short of resigning as City Attorney or resigning from the firm serve to eliminate the conflict?"

Answer: See No. 1.

3. Question: "If the marriage does not create an actual conflict of interest, or an appearance of one, sufficient to absolutely disqualify all of the firm partners from representing any client in contract negotiations with the City or any client before the _____ City Council, Planning and Zoning Commission, Board of Adjustment, or any other city board, commission, administrative agency or office, in which such activities may the firm partners continue to engage?"

   Answer: As long as proper separation of the spouse is maintained it would appear that the only limitation on other members of the firm would be dictated by actual conflict or obvious violation of the warnings contained in this opinion, or, of course, court order.

4. Question: "Does it make any different that presently _____ is a salaried employee rather than a partner with a stake in the overall profitability of the firm? If so, would her elevation to partnership status then bar the other partners from any or all of the activities specified in paragraph one (1) above?"

   Answer: The committee is of the opinion that this makes no difference.

The committee further is of the opinion that where, as here, full disclosure and consent are to be relied on to resolve possible conflict questions there must be an affirmative explanation by counsel of all the facts, legal implications, possible effects and other circumstances relating to the proposed representation and express consent by all parties, preferably in writing if possible, for representation by counsel.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

H

90-14 August 23, 1990

CONFLICT: COUNTY ATTORNEY REPRESENTING IN CIVIL MATTER

You state that one member of your firm (A) is county attorney and another member (B) is assistant county attorney. The morning following an auto accident the preceding evening, involving a client of the firm, (B) was engaged to represent a member of clients' family in investigation and civil litigation arising therefrom and he accepted. Thereafter a state trooper filed against the driver of the other vehicle, the defendant pled not guilty and the matter was set for hearing.

Thereafter (B) filed for appointment of special prosecutor which was granted. The special prosecutor appeared. Defendant did not appear and after taking of evidence, was found guilty of failing to yield one-half of the road.

H

You cite Section 331.755(2), formerly 633.755(2), Code, and request an opinion as to whether it applies in spite of:

1. your firm's private employment prior to the filing,

2. the filing having been without notice to or consultation with anyone in the office of the county attorney,

3. the steps taken to avoid conflict, and

4. no attempt having been made to gather any information from the county attorney's office.

Interpreting the law is a question of law for the courts, not this Committee. However, the general propriety of your representation under the facts is of proper concern to the Committee.

The Committee is concerned that as a county attorney (B) was aware that criminal charges might well be the normal consequences of the apparent actions or omissions. Thus, by accepting this employment he had an immediate conflict involving his official actions - i.e. that filing criminal charges might invoke Section 331.755(2).

The Committee is of the opinion that because of this conflict it is improper for counsel to represent this client in this case.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

90-17 August 24, 1990

CITY COUNCIL: MEMBER PRACTICING BEFORE BOARD

Your city council consists of a mayor and six councilmen. One of the councilmen is a lawyer. You are the corporation counsel of the city. Your city created a Human Rights Commission pursuant to state law. It is an autonomous, separate municipal entity, consisting of nine members. The city council has the power to appoint the members of the Human Rights Commission and to fill vacancies when they occur. The city council has no right of review or any appellate jurisdiction over the hearings or findings of the Human Rights Commission. The legal staff of the city, which includes your office, staffs the Human Rights Commission and represents it at its hearings and the members of that staff, of course, are employers of the city council.

H

You ask:

1. "May an attorney-employee of the Councilmember's law firm, other than the Councilmember, represent a private client who is named in a complaint and alleged to have committed an unfair or discriminatory practice under City _____ Ordinances _____ or represent respondents in hearings resulting from such complaints, such hearings being held by the Commission pursuant to City of _____ Ordinances _____?"

2. "If the answer to question 1 is in the negative, are there specific procedures or practices that might be employed by the Councilmember's law firm that would permit attorneys in that firm, other than the Councilmember, to represent clients before the Commission?"

DR 8-101(A)(2) of the Iowa Code of Professional Responsibility for Lawyers states that:

> "A lawyer who holds public office should not . . . . (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

Canon 9 of the Code states:

> "A lawyer should avoid even the appearance of professional impropriety."

DR 5-105(E) states:

> "If a lawyer is required to decline employment or to withdraw from employment, no partner or associate of his firm may accept or continue such employment."

The lawyer-councilman or his partners or associates would be in the position of appearing in behalf of a client or clients and being opposed by staff employed by or through him, before a commission composed of members in whose appointment he participates.

Under the foregoing facts and disciplinary rules the committee is of the opinion that neither the lawyer-councilman nor his partners or associates may represent clients in connection with matters before the Human Rights Commission of your city.

The Committee knows of no way the provisions of DR 5-105(E) can be avoided.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

90-20 August 27, 1990

PARALEGAL CONFLICT

You have employed a paralegal who formerly acted as such for a lawyer against whom you now are requested to undertake malpractice litigation. She had some contact with the case out of which the litigation arises, but no major contact and in fact has little recollection concerning it. You ask whether there is impropriety in your accepting representation.

EC 4-2 and DR 4-101 address the responsibility of non-lawyer employees to maintain confidences of the office. However this is directed at the confidences of a client. In this case the "client" now seeks to be the plaintiff. There is no such responsibility concerning confidences involving the lawyer or the firm itself contained in our Code of Professional Responsibility for Lawyers.

H

Possibly one might consider Canon 9 applicable - the appearance of impropriety. But this seems actually a non-sequitur. One can in fact argue that the only way of establishing the facts in a case of impropriety by a lawyer is through his or her co-workers.

Whether or not the paralegal's involvement was major seems immaterial. It is the opinion of the committee that there is no impropriety in your firm's representation under the facts submitted.

90-23 August 27, 1990

INTERPRETING 89-50, PRACTICING BEFORE FORMER PARTNER

A former member resigned from your firm January 1, 1990. Now, effective August 20, 1990, she will become Juvenile Court Referee in your judicial district.

You ask whether the restrictions in Committee Formal Opinions 89-21 and 89-50 apply to members of your firm appearing before her.

It is the opinion of the Committee that the restrictions of F.O. 89-21 and 89-50 apply to firm members leaving the firm for appointment to judicial positions and not to one-time former members. Therefore the opinions do not apply to present members of your firm.

90-24 August 27, 1990

LAWYERS: CONSULTANT IN LAW AND ACCOUNTING

You state that you are both a lawyer and CPA and have practiced both over a period of years. You plan to retire from your law firm at retirement age and open a consulting office practicing primarily in litigation support, compliance auditing and bankruptcy, offering both legal and CPA expertise.

You ask whether you may advertise this limited practice by direct mail and otherwise stating such things as:

"1) I am operating a CPA practice limited to litigation support area, compliance auditing area, and bankruptcy area;

2) I have practice law for over 40 years with a great deal of work in the valuation fields;

3) I have been a CPA for 32 years;

4) I have taught school in these fields both at the University level and the law school level;

5) I have been a director of a financial institution since 1974."

It is the opinion of the Committee that as long as you continue the practice of law you must comply with the Iowa Code of Professional Responsibility for Lawyers, in all respects. This of course includes the provisions as to the name under which you practice, DR 2-102, and all advertising provisions, DR 2-101 through DR 2-105.

90-32 November 26, 1990

LIVING TRUSTS: INTERPRETING OPINION 90-1, 90-2

You have submitted seven "scenarios" for the establishment of estate planning entities and their operation and request an opinion as to the propriety of the method of operation and of lawyer participation therein and the applicability of Committee Formal Opinions 90-1 and 90-2.

References to Ethical Considerations (EC) and Disciplinary Rules (DR) are to the Iowa Code of Professional Responsibility for Lawyers.

In Opinion 90-1 the committee addressed practice of law by non-lawyers in the following language:

> "The Concern would offer, circulate, distribute and sell through its agents various documents, instruments and other materials and information written and/or in person and give advice as to their use and effect in the creation of legal documents intended to create or re-create legal interests in property, to dispose of real and personal property, to create or modify trusts, to affect or avoid probate, to affect federal and state tax liability and in other ways to determine, establish or amend legal rights of its customers. The committee is of the opinion that this constitutes the practice of law as defined in Supreme Court Rules 121(i)(4) and 123.7 and in Bump v. District Court of Polk County, 5 NW 2d 914 (1942); Committee v. Gartin, 272 NW 2d 485, (1978). See also People v. Schmidt, 251 Pac 2d 915 (Colo. 1952) and State v. Schmitt, 258 P 2d 228 (Kansas 1953)."

Some or all of these activities are proposed in the last five submitted scenarios. This committee has no authority over non-lawyers and makes no determination as to the general legality or propriety of the operation of the seven proposed estate planning entities. It does, however, have responsibility to determine the propriety of lawyer participation therein.

Therefore with the caveat that the committee believes the operation of the last five scenarios by this entity, as described, to be the unauthorized practice of law the following response is made:

I

It is the opinion of the committee that if the lawyer has no part in the operation of the Entity or the Seminar, as indicated in the submitted statement of facts and no referral comes therefrom, it is not improper for counsel to accept representation of persons who may have attended such a seminar.

II

It is the opinion of the committee that if the lawyer has no part in the operation of the Entity or the Seminar, as indicated in the submitted statement of facts and no specific referral comes therefrom, it is not improper for counsel to accept representation of persons who may have attended such a seminar.

III

It is the opinion of the committee that if the lawyer concerned is one of those listed by the seminar presenter and the lawyer has attended such a seminar and/or purchased material from the entity this would constitute referral in violation of EC 2-9 and DR 2-103(A), (B), (C), and (D) and would be improper.

IV

It is the opinion of the committee that one of the concomitants, whether expressed or not, in counsel attending the Seminars and/or purchasing Entities' material is the referral by Entity and this indication of Entity training constitutes referral in violation of EC 2-9 and DR 2-103(A), (B), (C), and (D) and would be improper.

H

V

It is the opinion of the committee that the recommendation of counsel, as in scenario IV constitutes referral in violation of EC 2-9 and DR 2-103(A), (B), (C), and (D) and would be improper.

VI

It is the opinion of the committee, if counsel has attended an Entity Seminar and/or purchased its material, that by participating in the Seminar, as set forth in this scenario, counsel endorses Entity and its documents and becomes a legal representative of the Entity giving legal advice under the sponsorship of the Entity and would be aiding and participating in unauthorized practice of law in violation of EC 3-1, 3-2, 3-3, 3-4, 3-5 and 3-8 and in violation of DR 3-101(A) and DR 3-103(A).

Referral of cases to counsel not only would be improper referral as in previous scenarios but would create representation of conflicting interests by accepting also representation of a seminar attender in violation of EC 5-1, 5-2, 5-14, 5-15, 5-21 and 5-23 and of DR 5-105(C) as well as EC 7-18 and DR 7-104(A)(2). Thus participation in scenario VI would be improper.

VII

The committee is of the opinion that scenario VII exacerbates the problems in scenario VI and participation therein also would be improper for the same reasons.

90-34 March 11, 1991

CONFLICTS: LAWYER ALSO ZONING COMMISSIONER

You serve as zoning commissioner and raise two questions:

1. "In the past, when applications have been made to the Zoning Commission by clients or others with whom I have a close relationship, I have abstained from voting. I propose to continue to do so. Is this insufficient or must I resign?"

   Answer: It is the opinion of the committee that, in the absence of perceivable conflict, there is no inherent conflict in your relationship as a zoning commissioner and being a lawyer and that your abstention from voting is sufficient.

   In the event actual conflict does occur your firm should not represent those clients in that matter.

2. "Does a prohibited conflict of interest exist when I or an attorney in my firm represents a client whose interests are adverse to the City merely by virtue of the fact that I serve on a municipal commission? Again, I am referring here to matters that do not touch upon zoning or the Zoning Commission. So, for example, is there a conflict of interest or an 'appearance of impropriety' if my firm is involved in litigation against the City while I sit on the Commission?"

   Answer: For the same reason as stated above, in the absence of perceivable conflict, it is the opinion of the committee that your being a zoning commissioner in such cases is not per se improper.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

90-35 February 26, 1991

CONFLICT: CITY ATTORNEY OWNING AFFECTED REAL ESTATE

You and your partner own a downtown building. Your city council is to consider a resolution of necessity to improve the street.

You are and for 16 years have been city attorney. The council has hired another law firm, expert in bond issues, to handle this matter, but you have been asked to appear at the hearing by the city manager.

You ask whether the fact that you own property which will be affected by the improvement creates an ethical conflict requiring you not to appear at the hearing to represent the city.

The city's bond procedure is the responsibility of the other law firm. Your responsibility to the city council is as its general legal advisor. The two responsibilities are separate.

It is the opinion of the committee that your responsibilities as city attorney are not affected by your ownership of property which will or may be affected by council action, in the absence of actual violation on your part of DR 8-101(A)(1) and (2) concerning action as a public official, there is no indication thereof in this case as reported to the committee.

The committee is of the opinion that such appearance at the hearing by you as city attorney is not improper.

Even though in a community of your size your firm's property ownership may be well known, you may want to make a public statement of it at the hearing to avoid even the appearance of impropriety.

This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits.

90-38 March 11, 1991

ABSTRACTS: REVIEW OF 89-40 - OPINIONS TO BOTH PARTIES

You have asked the committee to reconsider its opinion 89-40 (February 20, 1990) "to allow a lawyer to write a title opinion to be relied upon by both the lending institution and the borrower as long as appropriate disclosure is made to both entities."

Formal Opinion 89-40 held that it would be improper for counsel who is lawyer for a credit union in real estate transactions also to act as lawyer for the credit union's member-borrowers in the same transactions. The representation considered in that opinion would have included furnishing a title opinion to both the credit union and its member-borrower.

Opinion 89-40 was based on the facts therein considered only. It contains the following caveat:

> "This opinion applies only to the facts involved in this request for opinion. Each question of conflict must be determined upon its own merits."

You postulate the following facts:

1. The borrowers engaged you to represent them in connection with the purchase of a home.

2. The borrowers' employer was paying attorney fees.

3. You negotiated with the relocation service engaged by the employer.

4. The relocation service sought to have you furnish to it either title insurance policy or a Title Guaranty Certificate or a title opinion. you stated to them that you could not represent them since the borrower is your client.

This is a completely different scenario than a routine real estate transaction wherein counsel prepares a title opinion for the borrower and later an opinion for loan purposes to the lender. The facts in Formal Opinion 89-40 also were a different scenario.

In your transaction you actually negotiated for the borrower and were involved in the formulation of the transaction involving the borrower, seller and relocation service. It is the opinion of the committee that you were right and acted properly in not also accepting representation of the relocation service.

It is the opinion of the committee that a lawyer may furnish a title opinion to both the lender and the borrower so long as the lawyer does not otherwise legally represent either party in the loan transaction or negotiations. With respect to the title opinion only, the lender and the borrower would not have differing interests. However, their interests do conflict as

to the mortgage transaction itself. If the lawyer represents one of the parties in negotiating that transaction, the lawyer may not represent the other party in the same transaction, but may furnish an opinion to the other party if it is agreed to by the parties and all understand who is counsel's client.

H

JURY SELECTION, METHOD AND ETHICS

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JURY SELECTION, METHOD AND ETHICS

I. Selection Process

A. Preliminary "Unpicking".

1. Observe juror's walk to the jury box.
2. Write juror's name in diagram simulating jury box.
3. Notes from juror questionnaire.
4. Observe facial expressions and "body english" during responses.

II. Voir Dire Examination

A. Purpose

1. Each prospective juror is examined on their "voir dire", i.e., on their oath to tell the truth.
2. Obtain knowledge of all relevant and material matters which might bear on the possible disqualification of a prospective juror.
3. Essential to counsel's intelligent exercise of the right to challenge for cause, or peremptorily.
4. Obtain a jury composed of persons qualified and competent to judge and determine the facts in issue without bias, prejudice or partiality.
5. To obtain information on which to base the challenge or objection to a prospective juror. Objections are waived if no challenge is made before the jury is sworn. **State v. Hendrickson, 44 N.W.2d 468, 472 (Iowa 1989).**
6. Obtain information which will be of value in evaluating counsel's choices for strikes.

B. Scope of Examination

1. Wide latitude is allowed counsel in examining jurors on their voir dire.

2. The latitude allowed counsel in the voir dire of prospective jurors rests largely in the trial court's sound discretion. The judge must be a fair and impartial arbiter. **Wilson v. Ceretti**, 210 N.W. 2d 643, 644 (Iowa 1973); **Anderson v. City of Council Bluffs**, 195 N.W. 2d 373, 377 (Iowa 1972).

3. Counsel should be given the right to inquire freely about the interests, direct or indirect, of the prospective juror which may affect the juror's deliberations and eventual decision.

4. It is essential to obtain information on the prospective juror's mental attitudes toward the issues to be tried, however, limit your questions to those which are pertinent and proper for testing the capacity and competency of the prospective juror.

5. Questions framed to ascertain probable bias or ground of disqualification, are permissible.

6. A challenge for cause must specify the facts constituting the cause of the prospective juror's cause for disqualification, bias, prejudice, or partiality. See IRCP 187, Appendix A.

C. Method

1. With pride, state who you represent and introduce assisting counsel and legal assistant, if present.

2. A few opening comments about your client's theory of defense.

3. Begin with general questions addressed collectively to the group of prospective jurors.

   a. Some of the general questions should require an indicating response, i.e., signal by raising a hand.

   b. Follow-up individually.

4. Most of the questions should be open-ended, requiring an explanation or narrative type response.

5. Questions requiring certain jurors to describe or explain their work activity are helpful.

6. Frame questions which will elicit information on the prospective juror's impairments, i.e., hearing, vision, health and physical disabilities, which would affect their ability to follow the evidence and be comfortable while seated for extended periods of time over the course of consecutive days.

7. Frame questions seeking information on the personal routine and schedule of the prospective jurors, especially if trial of the case will continue beyond 4 days.

D. Suggestions

1. Compare:

> Do you know of any reason, whether I've asked it or not, why you cannot be fair and impartial?
>
> Knowing yourself as you do, your experiences, what influences you, what you prefer and do not like; if you were a party whose case is being tried would you want someone on the jury with your current state of mind, mental attitude and preferences?

2. Have I posed a question to another prospective juror, which I have not posed to you, but had I posed the question to you there would be something in your background on which you would have commented?

3. Spontaneous responses to questions are more likely if prospective jurors are not questioned sequentially.

4. Utilize the potential influencing technique with a prospective juror vulnerable to a strike.

E. Insurance

1. Query in a personal injury case:

> Is any prospective juror or a relative an employee or stockholder or officer or director of an insurance company writing liability type insurance?

2. The insurance question should be asked once and done collectively to the entire group of prospective jurors.

3. If a prospective juror indicates an affirmative response to the insurance question, counsel must be careful in follow up questions so as to avoid an effort to impress upon the jury that the defendant's liability is covered by insurance.

F. Ethical Considerations

1. Questions of prospective jurors must be asked in good faith.

2. Questions cannot be framed to improperly inject prejudicial matter into the minds of the jury. **Mead v. Scott,** 256 Iowa 1285, 1293, 130 N.W. 2d 641, 645 (1964).

3. Suggested reading:

   A Judge's View Of Trial Practice by The Honorable George G. Fagg, 28 Drake Law Review No. 1 p.1

G. Conclusion

1. Good luck.

187. Impaneling jury.

a. Selection. At each jury trial the clerk shall select sixteen jurors by drawing them from a box without seeing the names. The clerk shall list all jurors so drawn. Computer selection processes may be used instead of separate ballots to select jury panels. Before drawing begins, either party may require that the names of all jurors be called, and have an attachment for those absent who are not engaged in other trials; but the court may wait for its return or not, in its discretion.

b. Oath or examination. The prospective jurors shall be sworn. The parties may then examine those drawn. The court may conduct such examination as it deems proper. It may on its own motion exclude any juror.

c. Challenges. Challenges are objections to trial jurors for cause, and may be either to the panel or to an individual juror. The court shall determine the law and fact as to all challenges, and must either allow or deny them.

d. To panel. Before any juror is sworn, either party may challenge the panel, in writing, distinctly specifying the grounds, which can be founded only on a material departure from the statutory requirements for drawing or returning the jury. On trial thereof, any officer, judicial or ministerial, whose irregularity is complained of, and any other persons, may be examined concerning the facts specified. If the court sustains the challenge it shall discharge the jury, no member of which can serve at that trial.

e. To juror. Challenge to an individual juror must be made before the jury is sworn to try the case. On demand of either party to a challenge, the juror shall answer every question pertinent to the inquiry, and other evidence may be taken.

f. For cause. A juror may be challenged by either party for any of the following causes: (1) Conviction of a felony; (2) want of any statutory qualification required to make him a competent juror; (3) physical or mental defects rendering him incapable of performing the duties of a juror; (4) consanguinity or affinity within the ninth degree to the adverse party; (5) being guardian, ward, master, servant, landlord or tenant of the adverse party, or a member of his family or in his employ; or being a client of any attorney engaged in the cause; (6) being a party adverse to the challenging party in any civil action; or having complained of or been accused by him in a criminal prosecution; (7) having already sat upon a trial of the same issues; (8) having served as a grand or trial juror in a criminal case based on the same transaction; (9) when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent him from rendering a just verdict; (10) being interested in a question like the issue to be tried; (11) having requested, directly, or indirectly, that his name be returned as a juror for the regular biennial period; (12) having served in the district court as a grand or petit juror during the last preceding calendar year.

Exemption from jury service is not a ground of challenge, but the privilege of the person exempt.

g. Number—striking. Each side must strike four jurors. Where there are two or more parties represented by different counsel, the court in its discretion may authorize and fix an additional number of jurors to be impaneled and strikes to be exercised. After all challenges are completed, plaintiff and defendant shall alternately exercise their strikes.

h. Vacancies. After a challenge is sustained, another juror shall be called and examined and shall be subject to being challenged or stricken as are other jurors.

i. Jury sworn. The clerk shall read the names of the eight jurors who remain on the list after all others have been stricken. These shall constitute the jury and shall be sworn substantially as follows:

"You and each of you do solemnly swear (or affirm) that you will well and truly try the issues wherein ..... is plaintiff and ..... is defendant, and a true verdict render; and that you will do so solely on the evidence introduced and in accordance with the instructions of the court; so help you God." [Report 1943; amendment 1980; amendment 1982; 1986 Iowa Acts, ch 1108 §55]

Referred to in §602.8102(154)
See also ch 607A

OPENING STATEMENT

Craig D. Warner
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Burlington, Iowa

I

THE LAW OF OPENING STATEMENT

A. Rules:

1. Iowa Rule of Civil Procedure 191.

> "(a) The party having the burden of proof on the whole action may briefly state his claim, and by what evidence he expects to prove it;
>
> (b) The other party may similarly state his defense and evidence."

2. U. S. District Court - N.D. and S.D. - Iowa. Local Rule 6(b) limits Opening Statement in Iowa Federal Courts to 15 minutes unless otherwise ordered.

3. Iowa Criminal cases see Rules of Criminal Procedure 18(1).

While the Constitution requires that trials be fairly constructed and that guaranteed rights of defendants be scrupulously respected, an opening statement by the defendant is not such a guaranteed right. However, failure to afford the defendant the opportunity to make an opening statement can constitute error. United States v. Zielie, 734 F.2d 1447 (1984 CA 11 Fla.)

B. What it is.

Counsel should only tell the jury about the evidence or an outline of the facts which counsel in good faith believes will be offered and admitted in evidence. Kester v. Burns, 326 N.W.2d 279, 281 (Iowa 1982), Yaeger v. Durflinger, 280 N.W.2d 1, 5 (Iowa 1979), State v. Roberts, 121 N.W.2d 513, 515 (Iowa 1963).

Good faith references in opening statement to inferences that may be drawn from potential evidence are permissible. Hamann v. State, 324 N.W.2d 906 (Iowa 1982). It should be devoted to a statement of the facts and conclusions to be drawn from such facts. State v. Kendall, 200 Iowa 483, 203 N.W. 806.

C. Trial Court's Discretion.

The trial court has a large degree of discretion and control in dealing with statements made by counsel in opening statement. State v. Christiansen, 193 Iowa 56, 186 N.W. 462.

A rather wide lattitude is ordinarily allowed counsel as to what to say to a jury in opening statement. Mead v. Scott, 130 N.W.2d 641, 645 (Iowa 1964). In every case that is tried there are usually found statements as to what counsel expects to prove but later found not proven. State v. Roberts, 121 N.W.2d 513, 515 (Iowa 1963).

In determining whether counsel is in good faith, the trial court has wide discretion and must necessarily rely on counsel's food faith as he proceeds with his opening statement. State v. Roberts, 121 N.W.2d 513, 515 (Iowa 1963)

D. Appellate Court Review.

If the trial court sustains an objection, the appellate court will presume the jury gave attention to the trial court's ruling. Barr v. Clinton B. Works, 179 Iowa 702, 161 N.W. 695. In the absence of peculiary, prejudicial or inflammatory statements and the sustaining of an objection, the trial court's admonishment of counsel as to what he could or not do in the presence of the jury is viewed by the appellate court as being prima facie sufficient to cure the objection. State v. Christiansen, 193 Iowa 56, 186 N.W. 462.

J

An appellate court is reluctant to interfere with the result of the trial even though counsel in his zeal transgresses the bounds and propriety in opening statement unless error or prejudice are shown. Barr v. Clinton B. Works, 179 Iowa 702, 161 N.W. 695.

In the absence of good faith or where prejudice is clearly produced, whether as a result of accident, inadvertence or misconception, if the trial court's actions to cure the prejudice cannot or are not sufficient to

eliminate the harmful effect, a new trial can be granted. 75 AmJur2d. Trial, Section 204-210. Prejudicial error must be shown for an appellate court to act. State v. Kendall, 200 Iowa 483, 203 N.W. 806.

E. Admissions.

Admissions made in opening statement are binding and can be a substitute for and dispense with the actual proof of the facts admitted. State v. Wilson, 166 Iowa 309, 144 N.W. 47, Rehearing denied 166 Iowa 309, 147 N.W. 739. The basis for binding the party is that the attorney is acting as his client's agent and within the scope of his authority, 75 AmJur2d. Trial, Section 202, and if made in the party's presence and without objection, the statement is presumed to be with his consent. State v. Wilson, supra.

F. Directed Verdict.

There do not appear to be any Iowa cases wherein a directed verdict was granted following an opening statement, but it is well established elsewhere that the court can grant a directed verdict and enter judgment upon an opening statement where it is shown that there is no right to recover. However, a verdict should be directed only when it is shown that the statement of counsel is full, exact and explicit and it is plainly evident that no case can be made. 75 AmJur2d, Trial, Sections 458-462 and 507-518.

II

CONSIDERATIONS FOR OPENING STATEMENTS

A. Use of Motions in Limine and Rule of Evidence 104.

A Motion in Limine prohibits opposing counsel from making statements regarding inadmissible and prejudicial evidence. Rule of Evidence 104 allows you to get advance ruling from the court on challenged evidence, both testimonial and demonstrative.

B. Purpose and Importance of Opening Statement.

The formal purpose of the opening statement is to state your case and tell the jury how you will prove it.

Informally, your purpose should be to prepare the jury for the harmful features of your case and refute your opponent's theory of the case.

Enhance your credibility.

Deliver your opening statement in a persuasive manner.

C. Importance of Opening Statement.

Psychologists say that 80% of jurors make their ultimate decision by the end of opening statements and then look for evidence and argument to support their position.

Opening statement is one of the first impressions. First impressions often become permanent impressions. The jurors are at their highest level of attentiveness and interest.

The better the plaintiff's opening statement is, the more essential it is for the defense to overcome the psychological benefits of primacy enjoyed by the plaintiff.

III

STRUCTURE OF OPENING STATEMENT - HAVE ONE

At a minimum your opening statement should provide the answers to the traditional who, what, when, where, and why.

A. To the extent not covered in voir dire, a thoughtful introduction of your client and other parties and key witnesses is a must. Introduce your client as you want him portrayed. If it is a corporation, portray it in terms of its personal representatives. Key witnesses should be characterized as respectable and credible as is possible.

B. Introduce and discuss the instrumentality of alleged harm. Focus on the more critical aspects of it.

C. Discuss the time and place of the events in the context of their importance.

D. State the facts as to why or how the event happened.

E. State the factual basis of your conclusion of liability or non-liability. Generally you will not be allowed to discuss the law in any detail in opening statement. However, to some extent and depending on the type of case, the jury must have some understanding of basic legal issues of the case and it may be wise to discuss this with the court and opposing counsel.

F. Anticipate and refute the facts and conclusions of the opposing case.

G. State what you want. Tell the jury what it is you are asking them to do.

H. Conclude your opening statement. The manner of conclusion should be positive and confident that the facts of the case will support the jury's verdict in your client's favor.

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IV

CONSIDERATIONS FOR AN EFFECTIVE OPENING STATEMENT

A. Identify the major theme of your case.

Development of a simple theme for your entire case through your conclusion and closing argument to the extent possible should initiate in voir dire and should definitely be presented in your opening statement. A simple integrated overview of your evidence giving a jury a logical and sensical statement of your case stands the best chance of being understood.

There are numerous considerations and variables in selecting the focus of your presentation. Identify why you believe in your case and why everyone else should believe in your case. If you don't believe in your case, chances are you will not persuade someone else to either.

Is your client a target defendant or a peripheral defendant. Do you and your client want to be highly visible or laid-back?

Are you the first named defendant or are you down the line? Are your interests compatible or antagonistic to co-defendants?

What will the co-defendants say about your client?

Do you want to show all of your case in opening statement or do you want to hold something back for surprise?

For an effective opening statement the individual aspects of your case will cause you to emphasize or minimize the structural framework of your opening statement to best present your case.

B. Presenting your defendant.

An effective plaintiff's opening statement will put your defendant in a poor light. Introduce and present your client in the best possible way so that the jurors can identify with him. The more likely the jury can identify with your client in any way, the more likely they will be to agree with him. Always try to personalize your client and remember the opening statement is your first opportunity to do so.

C. Identify known weaknesses.

When you know that your opponent knows of a weakness in your case and intends to emphasize it, volunteer the area of weakness without apology and you present it in the best light possible.

D. Use of the rhetorical question.

The rhetorical question in opening statement is an effective way of getting attention. After stating some prefatory facts ask: "What really happened?, What did he do? Why did this collision take place? etc."

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E. Minimize the statement of expectation of what the evidence will show.

Since we must state what we expect the evidence will show, when explaining what you expect it to show, do not keep repeating the phrase "we expect the evidence will show". Either ignore stating "we expect to show", or "we expect to prove" and simply tell the jury what the evidence will be; or make one statement that you will not repeat the phrases "we expect to show" or "we expect to prove" before everything that you are going to tell them, but that what you are about to tell them, is what you expect to show or prove.

F. Use of visual aids.

Consider using a Rule of Evidence 104 motion so that you will be permitted to use demonstrative evidence in your opening statement. While the primary focus of opening statement is talking to the jury, points may be emphasized by actually showing the evidence.

Also, consider using non-evidentiary visual aids, but only if non-controversial and not distracting to the spoken word.

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G. Avoid being argumentative.

The rule states that opening statements are to be brief statements of your claim and by what evidence you expect to prove it. Opening statements are not to argue conclusions, inferences, credibility or other matters beyond stating what you expect the evidence to prove. Often times there is a fine line drawn between arguments and statements and practices vary between jurisdictions and judges. To the extent you can, find out what your trial judge's practice is.

H. Avoid "legalese" and technical terms.

Remember, your job is to sell yourself and your case to jurors who should feel that they can trust what you say. Credibility and rapor will be lost with them if you do not talk in terms they can understand.

I. Gestures and non-verbal communication.

Gestures are a part of everyday life and an effective, well-timed gesture may often be expected. However, if unnatural or poorly timed, they can have an adverse affect on the jury.

Likewise, be mindful of the psychological affect of non-verbal communications. Psychologists have developed a whole course on non-verbal communication. Basically, there is no universally accepted court room style. Be yourself and develop your own style by identifying and capitalizing on your particular personal traits. Check with other people to see if your personal characteristics take full advantage of the subliminal factors you want to enhance and avoid the ones you should minimize.

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J. The best defense may be a good offense.

In the "How did it happen?" phase of your opening statement, consider not replying to the plaintiff's opening statement by simply negating statements of opposing counsel. Instead, after producing facts which "set the stage" for explaining how the accident happened, tell it affirmatively through the eyes of the defendant or a key witness.

CONCLUSION

While all aspects and stages of a trial are important, the opening statement comes at a time when individual jurors first

know they have been selected to judge your case and have just taken an oath to earnestly do that. Their interest level is high. Unlike the evidence and closing arguments, opening statements will probably never be referred to in the jury room. They do, however, create those first impressions and provide the framework around which the individual jurors will want to justify their first impressions.

TESTIMONIAL OBJECTIONS AND CROSS-EXAMINATION

Robert G. Allbee

I. Testimonial objections

A. Introduction

B. When to make objections

1. Jurors reaction to objections

2. Will the answer hurt

3. Does the objection have a solid legal basis

4. Is it necessary to preserve error

5. An objection as a tactical device

C. How to make objections

1. Timeliness

2. Specificity

3. Objections in equitable proceedings

4. Requests for rulings

D. Evidentiary objections

1. Relevance

2. Materiality

3. Privileged communication

4. Best evidence rule

5. Parol evidence rule

6. No foundation

7. No authentication

8. Hearsay

K

9. Leading

10. Narrative

11. Conclusion

12. Opinion

13. Repetitive (asked and answered)

14. Assuming facts not in evidence

15. Misstates evidence/misquotes witness

16. Confusing/misleading/ambiguous/vague/ unintelligible

17. Speculative

18. Compound

19. Argumentative

20. Improper characterization

21. Unresponsive/volunteered

22. Prejudice outweighs probativeness

23. Cumulative

24. Beyond the scope

25. Improper impeachment

E. Other objections

1. During jury selection

a) Mentioning insurance

b) Mentioning wealth (re punitive damages)

c) Arguing law

d) Arguing facts

2. Opening statements

a) Arguing law or instructions

b) Argumentative

c) Mentioning inadmissible evidence

d) Mentioning unprovable evidence

e) Giving personal opinions

3. Closing arguments

a) Misstating evidence

b) Misstating law

c) Giving personal opinions

d) Appealing to jury's bias, prejudice, or pecuniary interest

e) Personal attacks on parties or counsel

f) Prejudicial arguments

K

II. Cross-examination

A. Introduction

B. Necessity for cross-examination

1. Has the witness hurt your case

2. Is the witness important

3. Was the witness' direct testimony credible

4. What do you expect to gain from cross-examination

5. What risks do I need to take

Purposes of cross-examination

6. First, to elicit favorable testimony

7. Second, to discredit the witness or his testimony

C. Elements of cross-examination

1. Structure

a) Direct your cross-examination to establish only a few basic points

b) Make your strongest points at the beginning and end of your cross-examination

c) Vary the order of your subject matter

d) Avoid repitition of direct examination

2. Rules for cross-examination

a) Know the probable answer to your questions before you ask

b) Listen to the witness' answers

c) Do not argue with the witness

d) Do not let the witness explain

e) Keep control over the witness

f) Do not ask the one question too many

g) Stop when finished

3. Verbal approach

a) Make your questions leading

b) Make a statement of fact and have the witness agree to it

c) Use short, clear questions, bit by bit

d) Employ a take-charge attitude

e) Be a good actor

f) Use your natural style

D. Eliciting favorable testimony

1. Repeat favorable direct testimony

2. Corroborate aspects of your case

3. What must the witness admit

4. What should the witness admit

E. Discrediting cross-examination

1. To discredit the witness

a) Motive; e.g., greed, love, hate, revenge

b) Interest; e.g., financial benefit

c) Bias and prejudice

2. To discredit testimony

a) Perception, i.e., witness' ability or opportunity to observe event involved

b) Memory, i.e., ability or means of recall

c) Accuracy, reasonableness, logic of facts communicated in direct testimony

d) Conduct inconsistent with testimony

F. Impeachment

1. Prior inconsistent statements

a) Prior testimony; e.g., depositions, prior trials

b) Written or signed statements

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c) Oral statements; e.g., to police, hospital admission

d) Pleadings

e) Omissions, i.e., what witness failed to tell

2. Conviction of crime

a) Crime involving dishonest or false statement

b) Ten year time limit since conviction or release from confinement

c) Probative value must outweigh prejudice

3. Impeachment using treatises; e.g., experts

G. Special problems

1. Evasive witness

a) Remain steadfast in your examination

b) Inquire whether the witness understands the questions; or has difficulty hearing the questions

c) Allow jury to grasp witness' evasiveness

2. Explaining and arguing witness

a) Maintain control; cut him off with next question

b) Move to strike unresponsive part of answer

c) Ask the court to admonish witness

3. Obligatory or apparent cross-examination

a) An important witness for opponent

b) No effective way to discredit his testimony

c) Because jury will expect some cross-examination

(1) Who asked him to be a witness?

(2) Was he subpoenaed?

(3) Who has he talked to about the case?

(4) Discussed testimony with lawyer?

(5) Attend any meetings with other witnesses present?

(6) Read other materials to prepare his testimony?

(7) Make any notes on the incident?

(8) Read depositions and prior statements?

(9) Any financial or business interest in outcome of case?

(10) Any personal interest in outcome of case?

(11) Know any of the parties or witnesses?

(12) Compensation as a witness?

III. Special witnesses (examples identified but not subjects of this outline)

A. Expert witnesses

1. Require special preparation and technique

2. From many vocations; e.g., medical, engineers, safety, accounting, accident reconstruction, handwriting, etc.

B. Records witnesses

C. Reputation witnesses

IOWA DEFENSE COUNSEL ASSOCIATION 1991 FALL SEMINAR
"THE ART OF SUMMATION"

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II. OUTLINE OF SELECTED AUTHORITIES

Page

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III. ROBERT V. P. WATERMAN OUTLINE COMMENTS

1. Purpose and objectives of final arguments.

2. Contents of final arguments.

3. Demeanor in final arguments.

4. Utilization of visual aids.

5. Total knowledge of the case required.

6. Use of selected portions of critical testimony.

7. Use of instructions.

8. Length of time to argue -- jury attention.

9. Keep argument on the record -- do not refer to jokes, current events, testimony outside the record or related matters -- risk of objections from opposing counsel.

10. Whether to argue damages -- if necessary because of strong liability or substantial injuries -- sandwich this in your final argument.

11. Selected use of eye contact -- or none.

12. Take the high road at all times.

13. Use your own style and be yourself.

IV. RECENT IOWA AUTHORITIES RE: FINAL ARGUMENTS

EFFECTIVE USE OF YOUR OWN STAFF, WORDSMITHS AND FORENSIC PSYCHOLOGISTS

ALANSON K. ELGAR
MT. PLEASANT, IOWA

I USE WHAT IS AVAILABLE TO YOU.

- A. Defense Research Institute (DRI)
- B. International Association of Defense Counsel (IADC)
- C. Association of Defense Trial Attorneys (ADTA)
- D. Federation of Insurance and Corporate Counsel (FICC)

II HOW DO I JOIN EACH OF THE ABOVE?

- A. To be eligible for membership in DRI, over 50% of your practice must be civil defense oriented
- B. IADC, ADTA and FICC are invitational

III WHY SHOULD I JOIN ANY OF THE ABOVE GROUPS?

- A. Privileges of Membership
- B. You Owe It To Your Profession
- C. You Need To Expand Your Knowledge and Expertise
- D. The Benefits are Unlimited
  1. Participation Forums
  2. Educational Services
  3. Publications
     a) For the Defense
     b) Monographs
     c) Plaintiff's Strategy Quarterly

d) Special Problems

e) Seminars, Coursebooks and Position Papers

4. Litigation Support Services

a) Expert Witness Bank Index

1) What determines or qualifies an expert.

2) How do you get the most from your expert

3) Using your expert to assist you in deposing the Plaintiff's expert.

b) Brief Bank Index

c) Individual Research

d) Alternate Dispute Resolution

e) Transcripts of Testimony of Experts both Plaintiff and Defendants

D. Liason and Networking Opportunites in the Defense Community
E. Membership will look good on your obituary

IV FORENSIC PSYCHOLOGISTS

A. What is Neuropsychology

B. Differences from a Neurologist

C. Differences from a Psychiatrist

D. What is the key function of a Neuropsychological Assessment

E. Opportunites for Error

V WORDSMITHS

A. Creation of Computer Assisted Video Presentations

1. Cost Factor

2. Availability

3. Who is the Expert

4. What is the expertise needed for this presentation

5. Admissability problems

B. Reconstructions

C. Charts, Summaries and Calculations

D. Use of Computers in the Pre-Trial Setting

E. Use of Computers in the Trial Setting

F. If we don't use computers to assist us, our competition either will or more likely already has used them.

VI CONCLUSIONS

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October 8, 1991

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Dear Lanny:

Enclosed is copy of my April 1991 article on litigation support in the courtroom with a notebook computer.

Using scripts that I have written myself, I quickly prepare depositions for on-line full text search.

The command: f word-or-phrase

automatically searches all depositions in a case for the specified word or phrase. It first tells the lawyer the number of finds and then lists each find, one line per find. The first column of each listing is the name of the deponent. The second column of each listing is the page number of that specific find. The third column of each listing is the actual line from the deposition containing the find. If there are more finds than lines on the screen, the screen pauses when it is full and continues when the space bar is hit.

The command: page number name-of-deponent

automatically brings to the screen of the computer the specified full page of the specified person's deposition. The command np keeps turning the pages of that deposition forward from the page originally specified. np stands for next page. The command pp, which stands for previous page, keeps turning the pages backwards.

It is also possible for me to search witness statements and full text exhibits.

Our office has couple ways of getting the text into the computer. We always ask for ascii floppy disks of every deposition taken, in addition to ordering a transcript. We also have a Hewlett Packard ScanJet Plus which can be used to

scan material into the computer. If material is scanned in, one must then use optical character recognition software to make the file searchable.

We have developed our technique slowly and carefully. It is customized to the way we try cases. It is so easy and efficient that we can justify using it in even small cases.

As I indicated to you on the telephone the other day, using this system in the courtroom has been enlightening. I do not find myself constantly reaching for the computer when trying a case. I have found that it might only be used a half dozen or so times in a day. However when it is used, it is deadly, it is efficient, and it is quick. I am now at the point that if I had to try a case without my notebook computer and my scripts, I would feel handicapped.

Cordially yours,

BECKMAN & HIRSCH

David A. Hirsch

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Enclosure

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The Ultimate Trial Notebook — Abe Lincoln Never Had it so Good

By David Hirsch

As far as I know, I was the first attorney to bring a computer into the courtroom in Des Moines County. It was wonderful but not automatically so

The main reason I wanted the computer in the courtroom was to search the full text of depositions electronically in real time during the heat of the battle (in the midst of a courtroom "crisis"). Back in the June/July 1987 edition of The Bottom Line, I wrote an article entitled GRab the ExPression. It described what was then an innovative system for importing deposition transcripts to a computer and then searching the deposition electronically for specific words and phrases and printing out a report, all without the necessity of obtaining expensive litigation support software. Rereading that article provides me with a stark realization of how fast and how far computer hardware has evolved in the last four years, and of how much my own personal technique with a computer has changed and advanced in the last four years. GRab the ExPression pretty much contemplated searches being done in advance of trial. It required anticipation of issues. It was almost solely a preparation technique. Much of what happens in the courtroom cannot be anticipated. That is when the efficiencies of computer assistance can be most important.

The machine I now am able to bring in the courtroom is both the most advanced of machines and the most primitive of machines. It is a COMPAQ notebook computer weighing seven and a half pounds (including battery). Its base measures 8.5 inches by 11 inches, hardly more imposing than a sheet of letter-size paper—though 1.75 inches thick. It has a 20 megabyte hard disk, small by contemporary standards, but large enough for most courtroom purposes. By way of comparison, our largest office computer has a 330 megabyte hard disk and an 80386 chip. The notebook computer is driven by an old Intel 8088 chip, stodgy compared to the new 80386 sports models. Properly used, the 8088 is ample for most courtroom purposes. Retail price of the notebook computer is about $2,000. A souped up 80386 version could easily cost around $10,000. With a few tricks, the $2,000 notebook computer can do much of what before required a high-powered desk-top workstation.

Its small size and light weight turns this machine into a tool with a whole new dimension. Suddenly the information embedded into the dedicated office computer is transportable to the courtroom. It is reassuring to have accessible something as simple as the office's complete on-line telephone directory so laboriously assembled over the years. But it is the litigation support uses that are most impressive. The computer becomes something more than a machine used for preparation. It is a tool used in real time.

I found that I did not use the computer that frequently in the courtroom during my two and a half day trial, but when it was used it was like a precision air attack: swift, efficient and deadly. Full text depositions were instantly searched producing page numbers of requested words and phrases. My technique

has substantially advanced since GRab the ExPression

I now use scripts written by myself for use on full text deposition text I specifically prepare for computer searches. The old techniques seem primitive, even though the familiar **"grep"** command is still used.

Every shorthand reporter (or court reporter) seems to have a little different technique of preparing deposition diskettes. My scripts automatically strip the reporter's ascii text of residual control characters. Line numbers are cut, leading and trailing spaces, plus blank lines are erased, making the file more compact. The script then dissassembles the transcript page by page reassembling it in a form so the simple 'grep' command does its searches printing out lines containing the searched words or phrases including the page numbers of those lines, and the name of the deposition. More than one deposition can be searched simultaneously for the same word or phrase. The crude hunting knife of GRab the ExPression has become a precision-honed scalpel.

The notebook computer runs MS-DOS (the original operating system developed by Microsoft for the IBM PC). But with my custom written scripts preparing the text on my UNIX workstation, the prepared full text deposition can then be loaded on the MS-DOS notebook computer with the MKS Toolkit on it to do the type of litigation support I have become used to on my UNIX workstation. The MKS Toolkit, running under MS-DOS, brings with it most UNIX utilities. UNIX is a flexible, open and powerful operating system developed by AT&T Bell Laboratories more than 20 years ago.

"I found that I did not use the computer that frequently in the courtroom during my two and a half day trial, but when it was used it was like a precision air attack swift, efficient and deadly."

More than four score and seven years ago, Abe Lincoln appeared in court in Des Moines County. What would he think of the ultimate trial notebook where he could access the 1858 almanac on line to prove there was a full moon on the night in question?

David Hirsch practices law in the Burlington law firm of Beckman & Hirsch. He is Chair of the American Bar Association's Law Practice Management UNIX Interest Group. He has written on use of the computer by lawyers in several ABA publications and has written several articles for The Bottom Line.

HISTORY OF IOWA DEFENSE COUNSEL ASSOCIATION

By Edward F. Seitzinger, Des Moines, Iowa, Founder and First President of IDCA, and Annual Meeting General Program Chairman

In order to give you the background of the Association, I have to get a little personal for which you must forgive me. Back in 1964, I was sitting in my office one day when I received a call from Charlie Plager, who was a Washington, D.C. attorney and was a member of the International Association of Insurance Counsel (IAIC) and on the Board of the Defense Research Institute (DRI). They were meeting in Phoenix, Arizona when Mr. Plager called and asked if I would serve as a regional vice president for DRI. I asked him what the organization was all about and he gave me a thumbnail explanation. I asked him how long I had to decide about accepting the appointment and he said to take all the time I needed but he wanted to know in at least the next 30 seconds. Playing hard to get, I accepted.

At this same time, Edward J. Kelly was a member of the DRI Board and very active in IAIC. A week or so after the telephone call from Charlie Plager, Ed Kelly called and said we should have a meeting to consider organizing a defense counsel association in Iowa. At that time DRI had a program urging all states to organize local defense groups to offset some of the efforts that were being made by the plaintiff's original organization, National Association of Claims Counsel (NACC), which is now known as Association of Trial Lawyers of America (ATLA). It has always been gratifying to me that DRI, IDCA and other defendant organizations throughout the country have had as their primary purpose and interest, to maintain within the judicial system a judiciary

that would give fair treatment to the parties involved in litigation and to work at avoiding excessive, unreasonable and emotional judgments that have come to be so costly to the public.

In addition to myself, Ed Kelly called D.J. Fairgrave, a Des Moines defense trial lawyer; "big" Mike McCrary, who at the time was running Carriers Insurance Company; William J. Hancock, who was the vice president of claims for Allied Insurance; Frank W. Davis, a local Des Moines defense lawyer whose work was primarily for the railroads; and Paul D. Wilson, who at the time was heading up the claims department of Farmers Mutual Insurance Companies.

The first meeting was held at the Elk's Club in downtown Des Moines. After several meetings, we finally agreed that a defense organization should be started. One major decision was, of course, how much the dues were going to be and how large a membership we thought we could have. Bill Hancock and I believed we could get at least 150 members and the dues ought to be $10.00. D. J. Fairgrave thought Bill and I had lost our minds thinking we could get 150 members. "DJ" didn't realize that both of us were assigning cases to lawyers around the state. We soon had our 150 members. I drafted the Articles of Incorporation and we were off and running.

The first officers of the IDCA were Edward F. Seitzinger, President; D. J. Fairgrave, Vice President; Frank W. Davis, Secretary; Mike McCrary, Treasurer; and Edward J. Kelly, William J. Hancock and Paul D. Wilson made up the rest of the Board of Directors. Ed Kelly did not want to be an officer in the Association at that time for the reason he felt he might have a conflict from the standpoint of DRI and IAIC. He later became one of our outstanding Presidents and he served for the year 1977-1978.

Ed Kelly was the real catalyst in getting this organization started and off the ground and IDCA shall be eternally grateful for his contribution.

We had our first Annual Meeting on October 1, 1965 at Johnny & Kay's Motor Lodge and Restaurant. This first meeting started with registration from 10:00 a.m. to 12:00 noon. At noon the President, "yours truly", introduced William E. Knepper of Knepper, White, Richards, Miller & Roberts, Columbus, Ohio, President of DRI, who spoke on the subject "It can Happen Here." At 2:00 p.m., Gordon R. Close, of Lord, Bissell and Brook, Chicago, Illinois, spoke on "Products Liability." At 3:30 p.m., Walter W. Selvy, of Whitfield, Musgrave, Selvy and Kelly, Des Moines, Iowa, spoke on "The Iowa Judicial Selection Law - How It works." At 4:30 p.m., we had the first annual business meeting and election of the Board of Directors. That evening cocktails were at 6:30 p.m. and dinner at 7:30 p.m. Don Beving, of Beving and Swanson, Des Moines, Iowa gave a very humorous and entertaining talk on "How to Try a Lawsuit - Some Impractical Pointers."

On the morning of October 2, 1965, at 9:30 a.m., Harry Druker, of Cartwright, Druker, Ryden and Fagg, Marshalltown, Iowa spoke on "The Question of Damages Resulting from Recent Iowa Legislative Changes." At 10:30 a.m., Philip Willson, of Smith, Peterson, Beckman and Willson, Council Bluffs, Iowa spoke on "The Question of Contributory Negligence Resulting from Recent Iowa Legislative Changes." Following Phil's speech, there was an adjournment. I am sure you can see from the quality of speakers at our first Annual Meeting, that it went a great way to set the tone and quality for future IDCA programs.

At our first Annual Meeting Friday luncheon, we had rock cornish hen, and rock cornish hen has been our traditional Friday luncheon menu ever since, except for one year. I do not understand to this day why the President that year, Ralph Gearhart, thought a hamburger was superior to a rock cornish hen - it may be his lack of ability to carve the bird, or his insensitive palate - but anyway, there were so many complaints about the hamburger that rock cornish hen is now as much a part of the IDCA Annual Meeting as the entire program; I do hope they continue raising them for you for the next 25!

As I walked out of the first Annual Meeting with Herschel Langdon of Des Moines, he said to me, "Ed, if you continue to have this quality of a program, you'll never need to worry about having good attendance." Those of you who have a long experience with the Association and those of you who are relatively new, recognize what a great job every President-Elect has done in organizing the programs for the Annual Meetings. There isn't any question that this Association has one of the finest, most informative and outstanding programs of any legal seminar that is put on in the State of Iowa, or for that matter, anywhere else.

The original Board of Directors felt that getting a large membership was not an essential requirement. They believed that it was more important that a careful selection of members for membership be made so that those who became a member were philosophically dedicated to the defense of litigation, having a genuine concern for the interest of the public in general, have great legal talent and high moral standards. The membership of this Association can be justly proud of itself in that it contains the finest and best defense lawyers in the State of Iowa. It is my hope that future Boards of this Association continue to require the members to have this same philosophy of defense and

continue to recruit the highest quality lawyers to become members. It is only through this continued effort that we shall find continued growth, effectiveness and great respectability for IDCA.

One of IDCA's goals is to share their skills in training, education and demonstration. One way IDCA follows this through is by providing outstanding law school seminars which were first presented at Iowa and Drake in 1968 and have continued annually without a break since that time. They were the brainchild of Harry Druker and Ed Seitzinger. The original program was given at the College of Law, Drake University, May 10, 1968. The original purpose of the programs was to benefit law students, to benefit the IDCA and its participants, as well as to attempt to elevate the ability of trial lawyers. The form of the program which originally took an entire day to present was to have members of the IDCA present talks on the various aspects of trial. Harry Druker retired in 1978 and the programs have been handled by Ralph Gearhart since that time. In 1980 at the suggestion of Dean Bill Hines, Dean of the Iowa Law School, a trial demonstration was added to the program. This proved to be very successful and various aspects of trial have been demonstrated since that time. It should also be noted in 1980 the IDCA board voted to donate $1,000.00 to each law school to support its advocacy program. This practice has been continued to the present time. In 1980 summary jury trials were becoming common and it was decided this would be an excellent format for the law school seminars. In 1988 we were able to present a live case for the summary trial. This format was not only more interesting to the students but was also helpful to counsel who were able to get the reaction of a student jury to the issues in their case.

The law school seminars have become a tradition. Drake makes it a part of its Supreme Court weekend.

IDCA also made a contribution to assist Drake in its Moot Court program in 1989.

Another valuable program provided by IDCA is its legislative work. In 1979, responding to an increasingly successful legislative effort by the plaintiffs bar, represented by a team of lobbyists at the Iowa Legislature, IDCA moved to retain its own legislative representative, a lawyer who had previously served in both the Iowa House and Senate, Kevin Kelly. Working with a Legislative Committee chaired by then President-Elect, Herb Selby, this team undertook aggressive promotion of a positive program of tort reform legislation under IDCA board direction, shifting initiative away from the plaintiffs bar and leading to significant legislative achievements by the mid-80's, including modified comparative negligence (after the Iowa Supreme Court had imposed pure comparative negligence), elimination of unlimited joint and several liability, and some initial reforms as to punitive damages. By 1990, this effort was further augmented by the establishment of an Iowa Defense Counsel Association PAC, and the legislative effort is ongoing with Legislative Chairman Selby and his committee continuing to work with Kevin Kelly on Capital Hill, where his standing has continued to be enhanced as his seniority in the "Third House," together with his integrity and reliability, has become known and respected by members of both parties.

We are now building and are providing an expert witness bank, brief bank and trial court reporting system. This is truly a unique and valuable litigation support service for our members. Its continued success depends on every member sending in his briefs to the

Iowa Defense Counsel Association, in care of Judy Oggero, Rohm & Oggero Association, 520 - 35th St., Des Moines, IA Services, Inc.; telephone 515-274-5918.

IDCA established a Task Force to study the new Iowa Uniform Jury Instructions. The extensive review, analysis, research and redrafting required to compile the first report took nearly 1 1/2 years to complete. Dick Sapp, of Des Moines, chaired the first report. Volume I was prepared and distributed in October of 1990, at IDCA's expense to each member, and to each Iowa Supreme Court Justice, District Court Judge and Federal Court Judge.

Part II is now complete and will be distributed soon. Greg Barnsten, of Council Bluffs, Iowa, has chaired the preparation of the second report.

Approximately April of 1987, John B. Grier and Claire F. Carlson launched the first issue of *The Defense Update*, what now has become a valuable communication amongst our membership, with copies sent to our members, all Iowa judges and law schools. With thanks to the current Board of Editors, the *Update* is published four times a year and contains substantive articles of professional interest, and reports on the activities of the Association. I would like to encourage all of you to take an interest in the *Update* by voluntarily submitting articles for consideration, I am sure they will be appreciated.

August 22-24, 1991 marked the first Iowa Defense Counsel Association's College of Trial Practice. The intensive 2½ day workshop was held at the University Park Holiday Inn in West Des Moines, Iowa. The first 11 participants in the College ranged in experience from recent law school graduates to 12 years of practice. They studied and practiced all trial procedures from the *voir dire* to verdict. Using a prepared summary or record of a fictional case entitled *Watson v. Thompson*, the participants divided into groups

to practice each aspect of the trial in a courtroom setting. The College concluded with a 3-hour mock trial carried out by each of the groups. Each session and mock trial was accompanied by a meaningful session of critique by the other students and by faculty members. Each session of the College was videotaped as were the final mock trials. The College was certified for 15¼ hours of Iowa C.L.E. credit, which includes 10 hours of federal credit. The College awarded certificates of completion to each participant at the conclusion of the College. Because the College was such a tremendous success, it is anticipated that it will become a standard part of the Association's programming and we urge you to enroll or encourage a member of your firm to participate.

IDCA has received the Exceptional Performance Citation Award from DRI many times. This award acknowledge the efforts of state associations and their presidents and is given only upon attainment of criteria DRI deems essential to a strong association. Our Association continues to be a model for an active defense organization.

Robert A. Engberg of Burlington, Board member of IDCA, suggested and volunteered to index the Annual Meeting books - he has now completed this frustrating monumental task and Bob gets a big thanks for a *job well done!*

One of the highlights in IDCA's past 25 years was when we hosted the 11th National Conference of Local Defense Associations, April 6, 7 & 8, 1978. It took me about five years to convince the Association that a conference should be held in Des Moines, Iowa. They wanted to know what they could do in Des Moines, and I wanted to know what difference it made since they were coming here to work and not play. It was finally agreed that a conference would be held in Des Moines. The IDCA and DRI were the co-hosts for this conference. With the help of Bill Timmons, lobbyist for the

Iowa Insurance Institute for a good many years, the Iowa Insurance Institute generously offered to host a black tie dinner for us. The Governor of Iowa and other State officials, the Mayor of Des Moines, Iowa, the Insurance Commissioner, the Iowa Supreme Court Justices, U.S. District Court Judges, the Iowa Court of Appeals, many Iowa District Court Judges, executives of the member companies of the Iowa Insurance Institute, and all members of the 11th National Conference of Local Defense Associations attending the conference were invited. This dinner was held at the Des Moines Club. I don't recall exactly how many hundreds of people were there, but the attendance was very large and people from around the country who attended the conference were greatly impressed with the affair. At this conference, we gave each of the ladies who attended a 14 carat gold ear of corn charm as a remembrance of the conference held here in Des Moines. This ear of corn was designed by Holmes Jewelry of Des Moines. Even to this day, people who attended this conference will tell us it was the greatest National Conference of Local Defense Association meetings they have ever attended.

Those of you who attended the celebration of our 20th Anniversary when Harold Grigg was President in 1984, will recall what a great time we had. Part of our entertainment was a magician who, with the assistance of leading man Tom Hanson, of the law firm of Hanson, Bjork & Russell, Des Moines, Iowa, put on a hilarious show. We also had a hugh anniversary cake prepared and when it was wheeled in, much to everyone's delight, a beautiful young lady emerged! We ended this evening with dancing.

Our Silver Anniversary Annual Meeting in October of 1989 was a memorable session. We made this meeting a little more special by giving each registrant a surprise gift -- an executive office travel kit for their brief case, and the spouses in attendance

received a canvas tote bag. Thursday evening we enjoyed dinner aboard the Pathfinder Dinner Train, and from all comments received, everyone had a great time - most of you even did well on the Trains & Tracks Trivia, and we want to congratulate the ones winning the prizes given in each railroad car! Those of you who didn't make the trip missed a very pleasant and unusual evening.

Because the Silver Anniversary Meeting was special, I would like to expound on a few more highlights of the meeting.

Our Program Chairperson, Craig D. Warner, provided us with an exceptional list of subjects and speakers from Columbia, South Carolina; Chicago, Illinois; Minneapolis, Minnesota; Kansas City, Missouri, Washington, D.C., and of course, our own illustrious Iowa speakers.

The Friday night Annual Banquet was devoted to honoring the Founders and Past Presidents of the Association, and each received a beautiful marble desk pen set with the IDCA logo. We were especially pleased that Mike McCrary, a Founder and the first Treasurer of IDCA, came from Horseshoe Bay, Texas to be with us on this occasion.

Four special people were also honored that evening for their devotion and outstanding work, and they each received the same marble desk pen set in recognition of their contribution. I think it appropriate that I mention them here: Eugene Marlett, Betty Hyndman, Jerry J. Miller and Ginger Plummer. Gene Marlett, is our Treasurer - the handler of our funds who keeps us solvent; the amount of work Gene does each year goes to a great extent unnoticed, but not unappreciated! Betty Hyndman has silently but diligently worked with Gene since he became Treasurer; Betty keeps the membership records straight, and sees that you are registered at the Annual Meeting and all have paid

your dues! Jerry J. Miller, has been our Hospitality Chairman of the Annual Meetings for a number of years. Jerry is one fellow who probably receives the least recognition and has one of the worst jobs at these meetings. The list of dedicated people would not be complete without including the name of Ginger Plummer. Ginger has worked with me on the Association's Annual Meetings since 1970 and has been a great contributor to the Thursday and Friday evening activities. I guess the only thing to really say to these four dedicated people is, *"Thank You. . . you've done good!"*

Historically, the IDCA has gone to a dinner theatre on Thursday evenings of the Annual Meeting, but in 1988 we strayed from the usual and put on a Luau with video pictures actually taken in Hawaii by Richard E. Stifel, of Honolulu, who is State Chairman for DRI, and Mark B. Demarais, also of Honolulu. Ginger prepared the script for the video and it provided a fun-filled evening -- it was topped off by hula dances from some of our elite members --- can you picture *petite* Pat Roby, in a grass skirt, shaking those hips???

In appreciation of the efforts and fine work in the production of the video entertainment, the IDCA, by resolution, voted Virginia E. Plummer (known as Ginger to us), and Richard E. Stifel and Mark B. Demarais, both of Honolulu, Hawaii, IDCA's first Honorary Life Members.

The Board of Directors, at the suggestion of President Patrick Roby, at the board meeting following the Annual Meeting of October, 1988, and in my absence, adopted a resolution to annually recognize the board member who made the greatest contribution to the Association during the year. This recognition was to be given in honor of Edward F. Seitzinger for his years of service and was to be know as the *"Eddie Award"*. The first

"Eddie Award" was presented at the 1989 Silver Anniversary Annual Banquet to John B. Grier of Marshalltown, Iowa, for getting the IDCA quarterly newsletter, the *Defense Update*, off and running. The second "Eddie Award" was present at our 1990 Annual Meeting to Richard J. Sapp of Des Moines, for his leadership in heading the IDCA's Civil Jury Instruction Task Force, which study took 1½ years and resulted in the Association's report on civil jury instructions distributed to members in October of 1990.

At the Annual Meeting in 1989, we enjoyed dinner on the Pathfinder Dinner Train as I mentioned before, and in 1990, last year, we had a western-style BBQ Thursday evening. Everyone had a chance to be their childhood desire - a cowboy; we also had fun being photographed in western style costumes. This year we have an "Italian Fare" theme for dinner Thursday evening - no program or speakers, just good food and a relaxing time.

This summarizes when, how and what the Iowa Defense Counsel Association has accomplished over the past 27 years, of which I am very proud. Even though some of us will not be able to attend your Golden Anniversary (50th) in person, you can be sure we will be there in spirit. Keep up your committed dedication to the Iowa Defense Counsel Association and its basic philosophy. Thank you all.

WORKERS' COMPENSATION UPDATE
CASE LAW UPDATE
MAY 1990 - MAY 1991

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I. COURT DECISIONS

A. IOWA SUPREME COURT

1. Second Injury Fund

Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990)

Work-related injury to claimant's left knee sustained in 1980. Claimant received healing period benefits and permanent partial disability benefits based upon the 20 percent impairment rating to the left lower extremity. After returning to work, he received another injury to his right knee in 1985 for which he received healing period benefits and permanent partial disability benefits based upon a 20 percent impairment rating to his right lower extremity. He was released to return to work in June of 1986 but his physician recommended that he stay off his feet and pursue a more sedentary job. After that time, he was unable to obtain employment.

The Industrial Commissioner awarded claimant benefits from the Second Injury Fund based upon a 60 percent permanent partial disability for industrial purposes, less benefits paid by the employer for permanent partial disability. On appeal, the Supreme Court affirmed the Industrial Commissioner's award as to permanent partial disability.

The Second Injury Fund argued that for the Fund to become liable, the claimant's first injury must be a total loss of use, or, at a minimum, "a substantial loss that acts as a handicap to one's employment." The Court referred to its earlier decision wherein it stated that "'loss of use' was not intended by the legislature to imply 'total loss of use' of a member of the body, or of the body as a whole", citing Irish v. McCreary Saw Mill, 175 N.W.2d 364, 369 (Iowa 1970). The Court held that there is no minimum amount of loss of the scheduled members to qualify for Second Injury Fund benefits.

The Supreme Court cited Second Injury Fund v. Neelans, 436 N.W.2d 355, 357-58 (Iowa 1989), stating, "It is the cumulative effect of scheduled injuries resulting in industrial disability to the body as a whole--rather than the injuries considered in isolation--that triggers the Fund's proportional liability."

The Supreme Court attempted to clarify Neelans by stating that where the first and second injuries are confined to scheduled members, the liability to the Fund is for the entire industrial disability less the value of the two scheduled amounts. "... [T]he clear import of Neelans is that where both injuries are scheduled, that is, neither is itself an injury to the body as a whole, the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts. Only where one of the injuries is to the body as a whole must there be an apportionment." The Court thus rejected the Fund's argument that the Fund should be liable for only the impact of the claimant's first injury as it relates to the body as a whole, rather than for industrial disability resulting from the cumulative effects of two scheduled injuries. The Court pointed out that industrial disability can occur when the claimant sustains either an injury to the body as a whole, or when the claimant suffers the cumulative effects of two scheduled injuries.

The final issue addressed in the cross appeal of this case dealt with the Commissioner's refusal to pay statutory interest on the benefit award. Because the Fund's obligation cannot be determined until the employer's liability has been fixed, the Court held that the Fund does not become obligated to pay the claimant until a written order has been issued from the Industrial Commissioner. Accordingly, the Fund was ordered to pay interest at the statutory rate from the date of the Industrial Commissioner's Order.

It should also be noted that the Fund argued that the claimant's testimony was not credible as he had certified himself as willing and able to perform a variety of physically demanding jobs and that he regularly applied for such jobs in order to qualify for unemployment benefits. Although there was no specific finding made by the Industrial Commissioner in regard to credibility, this error did not require reversal as there was an inherent finding in the ruling that the claimant was credible. The Court found there was substantial credible evidence to support the award.

2. **Second Injury Fund**

Second Injury Fund v. Hodgins, 461 N.W.2d 454 (Iowa 1990).

The claimant received an award of Fund benefits due to carpal tunnel injuries to his right and left hands. The right hand was injured in May of 1980 and he was

awarded an 11 percent scheduled loss to the right hand. In October of 1985, the claimant injured his left hand while working for the same employer. The parties stipulated that this injury resulted in a ten percent scheduled loss to the left hand.

The Fund asserted that it is inherent in Section 85.64 that there be an intervening hiring between the first and second injuries. The Court refused to accept this argument, stating that the purpose of the statute is to encourage employers to hire disabled workers and retention of a disabled worker is consistent with this purpose. Accordingly, 85.64 does not require the intervening hiring prior to an injured employee becoming eligible for Fund benefits.

The Fund also argued that the claimant continued working for the employer and moved to a more challenging position prior to the closing of the plant. Thus, the Fund argued that the claimant could not have suffered an industrial disability. The Court held that the claimant's ability to work does not prove, as a matter of law, that the claimant did not suffer a loss of earning capacity. Here, there was substantial evidence to support the decision. The Industrial Commissioner's Decision was affirmed. The Court also cited Braden, supra, concerning the date from which interest accrues as being that of the Commissioner's order.

3. Judicial Review

Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990).

This matter was before the Industrial Commissioner on remand from the Supreme Court which held that the Industrial Commissioner failed to provide adequate reasons for rejecting the claimant's evidence of disability. Upon remand, the Commissioner denied the claimant benefits. The district court reversed the Industrial Commissioner and ordered that the Decision of the Deputy Industrial Commissioner be reinstated.

The Court pointed out that the Deputy Industrial Commissioner's Decision was a proposed Decision under Section 17A.15(2). Further, the Court indicated that with timely appeal to the agency (Commissioner), the Commissioner assumed full responsibility for deciding all issues of fact and law pursuant to Section 17A.15(3). The Court stated that, "[j]udicial review of the commissioner's order, [the] deputy's decision was no

longer a viable step in the proceeding. In reversing a final agency order (here, the commissioner's order), a reviewing court may only direct the agency to conform its decision to those matters which have been established as a matter of law."

4. Industrial Disability--Apportionment

Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991).

The claimant had nonjob-related back injuries from an automobile accident for which he had surgery but returned to light duty and received a full medical clearance. A year later, he received a job-related back injury which required further surgery. The claimant did not return to work and the Commissioner found a total of 35 percent industrial disability, of which 25 percent was related to the first accident and 10 percent to the later work-related injury.

The Court of Appeals stated that the total industrial disability was properly placed on the second injury. The Supreme Court affirmed, holding that the Commissioner should have avoided apportioning industrial disability between the work- and nonwork-related accident. The Court stated that there was no evidence to support a finding that the earlier, nonwork-related injury was in any way disabling to the claimant in his employment as a drill operator at the time of the second injury. The Court noted that there was no substantial evidence to support a finding that the prior injury independently produced an ascertainable portion of the industrial disability which existed following the later, work-related injury.

5. Bad Faith

Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990).

Claimant sued compensation carrier of his former employer for bad faith failure to pay workers' compensation benefits. He also asserted a claim for slander, alleging that the carrier had wrongfully stated that he was addicted to drugs and that the same was one of its reasons for failing to pay benefits. The jury awarded the claimant $75,000.00 in actual and $550,000.00 in punitive damages on the bad faith claim. The jury awarded Kiner $75,000.00 actual and $150,000.00 punitive damages on the slander claim. The district court ordered a new trial on all issues relative to

the bad faith claim, finding the $550,000.00 punitive award to be excessive. The Court left the punitive damage award of the slander claim in place but ordered a new trial on the actual damage award unless the claimant would agree to a $25,000.00 remittitur. Both the claimant and carrier appealed the district court judgment.

The Supreme Court held that the district court had subject matter jurisdiction of the bad faith claim. The Industrial Commissioner's exclusive jurisdiction under Chapter 85 is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of the employer's insurer. A footnote by the Court stated that they had never expressly ruled on the issue of whether an action for bad faith failure to pay a workers' compensation claim is recognized in Iowa. Here, this issue was not raised by the defendant. However, the Court noted that the claim had been recognized in other jurisdictions.

The Court went on to hold that there was sufficient evidence to submit the issue of bad faith to the jury in that a reasonable person could find that defendants failed to exercise an honest and informed judgment on the plaintiff's claim for pain medications and could further conclude that its denial was not fairly debatable. The Court concluded that a finding of "reckless disregard" of the lack of reasonable basis for denying a claim is not a necessary element in a bad faith claim. The Supreme Court held that the district court did not err in granting a new trial on the bad faith claim as a result of the size of the punitive damages.

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6. Retaliatory Discharge

Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990).

The facts involved the timeliness in filing notice of an accident with the employer. The defendant's safety program required accidents to be reported as soon as possible, and within two hours if physically possible. The claimant injured his back while loading his truck and was on the road at the time of the injury. The claimant contended that he called a dispatcher within 15 minutes of the injury and was told that he was to finish his trip. He continued with his assigned route and reported his injury daily to his dispatcher. The

claimant filed a formal, written report of his injury with the safety director when he returned from his on-the-job assignment.

The claimant was hospitalized and unable to work for four months, during which time he received workers' compensation benefits. When the physician released him to return to work, he was fired without explanation. When the claimant sought unemployment compensation, the defendant objected, asserting that the claimant was terminated for failing to timely report an injury as required by the safety program. At trial, the jury found that the defendant had discharged the claimant in retaliation for his filing the workers' compensation claim. Both parties appealed.

Evidence at trial showed that the claimant was fired after filing a workers' compensation claim when the defendant's own safety program would not call for termination solely for failure to report an incident. Although the claimant was an employee at will and could be terminated for any reason or no reason, the defendant's deviation from its established program was something for the jury to consider. The insurance director indicated at trial that the cost of paying workers' compensation benefits entered into his decision.

The claimant was discharged in retaliation for filing a workers' compensation claim. The jury found for the employee and awarded $33,000.00 compensatory and $100,000.00 punitive damages.

The issue revolved around whether or not the defendant violated public policy by discharging the employee in retaliation for filing the claim. The Court held that retaliatory discharge violates public policy, even if the employer does not interfere with the discharged employee's benefits.

The Court stated, "We consider the question of whether the claim for workers' compensation benefits must be the determining factor or the predominant purpose behind the firing....If retaliation is allowed to weigh at all in the employer's decision to discharge, there will be a chilling effect on employees entitled to claim benefits....A plaintiff need not show retaliation was the predominant purpose."

7. Bad Faith

Tallman v. Wausau Ins. Companies, 469 N.W.2d 706, (Iowa 1991).

The Supreme Court earlier discussed the issue of bad faith claims administration in Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988) (Tallman I), wherein the district court had ruled that plaintiff's common-law tort claim of bad faith against the employer's workers' compensation carrier was not actionable. On appeal, the Supreme Court held that neither Tallman I nor Kiner resolved the question of whether bad faith administration of a claim was recognized as a cause of action in the State of Iowa. The Court found that the record before it did not furnish a basis upon which to resolve the question because the insurance company had paid all the benefits that it was directed to by the Industrial Commissioner. The Court affirmed the district court's dismissal of Tallman's claim.

8. Indemnification

Thornton v. Guthrie County Rural Elec., 467 N.W.2d 574 (Iowa 1991).

Plaintiff was injured while working on a line while in the employ of an electrical contractor. Guthrie County Rural Electric Co-op contracted with the electrical contractor to replace underground cable. The plaintiff was injured while working on a line that had not been de-energized by Guthrie County REC.

The defendant admitted its own negligence and proximate cause and then cross-petitioned against the electrical contractor, alleging that it was negligent and that it was required to indemnify the defendant pursuant to their contract. Evidence was introduced that the electrical contractor failed to follow its own safety procedures or train employees concerning electrical lines. The Court held that there was substantial evidence to support the jury's findings that the electrical contractor was negligent and that the negligence was a proximate cause of the plaintiff's injuries.

Normally, a third-party action cannot be brought by a defendant against the plaintiff's employer, as there is no civil liability from the employer to the plaintiff-employee. See Iowa Power & Light Co. v. Abild Construction Co., 259 Iowa 314, 333, 144 N.W.2d 303,309 (1966). However, here the third-party action was based upon a contractual indemnity provision, which the Court found enforceable.

9. Subrogation

March v. Pekin Ins. Co., 465 N.W.2d 852 (Iowa 1991).

The plaintiff was injured in a work-related accident when his truck was rear-ended by an automobile. The claimant received workers' compensation benefits in addition to settling his claim with the automobile driver for her full liability insurance limits. Pursuant to 85.22, the recovery was surrendered to the compensation carrier in partial satisfaction of the compensation lien, leaving an unsatisfied subrogation interest.

Next, the plaintiff pursued his own insurer for recovery of underinsured motorist benefits. The claim was settled and the workers' compensation insurer filed a lien against the settlement proceeds, claiming subrogation rights under 85.22. The claimant moved to set aside the lien on the ground that the claimant's insurer did not qualify as a third party under the statute against whom the workers' compensation insurer could assert subrogation rights.

The district court vacated the lien and stated that 85.22 grants the workers' compensation insurer a lien with respect to damages recovered from the tort-feasor, but not against proceeds recovered pursuant to contract with the employee's own insurer. The Court looked to the deduction of the amount that the claimant had received from his compensation claim by the underinsured motorist carrier in arriving at the final settlement figure. The difference, the amount that the claimant received as a settlement, represented the liability of the underinsured motorist insurer. See McClure v. Northland Ins. Companies, 424 N.W.2d 448, 450 (Iowa 1988). The Court stated that the purpose of Section 85.22 is to permit the workers' compensation insurer to recoup monies from a tortious third party whose conduct has produced the injury which necessitates such payments, citing Schonberger v. Roberts, 456 N.W.2d 201, 202 (Iowa 1990). The workers' compensation insurer was subrogated to the claimant's recovery against the automobile driver.

The issue was whether the right of subrogation extends to recovery from a third party who was not the tort-feasor. The Court pursued a thorough analysis of other jurisdictions on this issue and noted that the majority of jurisdictions have held that the statutory subrogation based on legal liability

for damages caused by a third party does not extend to payments flowing from a contract for uninsurance. The Court found this position more persuasive, and adopted it in the context of underinsurance benefits.

The Court referred to Section 85.22 which states that the payment by the third party is subject to the lien only if the employee's injury is caused under circumstances creating a legal liability against the third party. The Court stressed the use of the word "caused" and noted that causation sounds in tort, not contract. Next, the Court looked to the damages language in Section 85.22 as a term ordinarily associated with a tort action. The Court noted that although the underinsured motorist insurer's obligation is measured by damages wrought by the tort-feasor, the payment is contractual. Under Section 85.22(5), "damages" is defined as "any payment made unto an injured party... by...any third party...liable for, connected with, or involved in causing an injury to such employee...." The underinsured motorist insurer clearly had nothing to do with the claimant's injuries. Its liability stems solely from the fact that neither the tort-feasor or the workers' compensation insurer adequately compensated the claimant and is clearly premised upon a contract.

The above comports with Section 85.54 which provides that no employee shall be required to "pay any premium or premiums for insurance against the compensation provided for in this chapter." By claiming the right of subrogation, the workers' compensation carrier is effectively seeking reimbursement for benefits claimant's employer is obligated by statute to furnish. In other words, the Court refused to interpret Section 85.22 in a manner inconsistent with the meaning of 85.34.

The Court concluded that the subrogation lien of Iowa Code Section 85.22 does not extend to underinsured motorist's benefits received by the employee pursuant to a privately owned contract of insurance.

10. Public Goodwill Doctrine

McKeag By McKeag v. Mahaska Bottling Co., 469 N.W.2d 674, (Iowa 1991).

The claimant's decedent was a pilot for a soft drink bottling company. He volunteered to help a friend of his, who was a model plane enthusiast, find a lost model plane by taking him for an airplane ride in the

company plane. He did so without the knowledge of his employer and in direct violation of company rules. The plane crashed and both men were killed. The claimant sought to extend the "public goodwill" doctrine which encompasses an injury causing act outside the scope of employment which may be considered in the course of employment if the act was undertaken to benefit a customer of the employer. The claimant argued that this doctrine should be extended to any member of the general public, or at least to any potential customer of the employer.

The Supreme Court refused to broaden the doctrine, concluding that even if the doctrine were to be extended, this case did not contain facts which would serve as an appropriate basis to do so. In this case, the claimant's decedent's death occurred during an activity that was not authorized and which was contrary to an express prohibition and, accordingly, did not arise in the course of his employment, even under the public goodwill doctrine or any possible extension thereof.

11. Collateral Source Rule--Subrogation Rights

Schonberger v. Roberts, 456 N.W.2d 201 (Iowa 1990).

The claimant was on his way to work and was picking up his employer's mail when he was struck by the defendant, Roberts. Roberts was driving a truck owned by the defendant trucking corporation. The claimant suffered $7,625.00 worth of medical bills and those expenses, as well as future medical expenses, were being reimbursed as part of the workers' compensation benefits that Schonberger was receiving.

Schonberger brought his tort action for his injuries and obtained a jury verdict, with 80 percent of the negligence assessed against Roberts.

The primary issue revolves around the trial court's refusal to allow introduction of evidence regarding payment of medical bills and other workers' compensation benefits to Schonberger.

The Court reviewed the Iowa statutory history concerning the right of indemnity to workers' compensation employers or their insurers for amounts paid under the act from recoveries realized by the worker in tort actions for the same injuries. The Court began its analysis by verifying that Schonberger's workers' compensation insurer was entitled to be compensated

from his recovery in this suit for any amounts paid to or for him on account of this injury, citing Liberty, Mut. Ins. Co. v. Winter, 385 N.W.2d 529, 531-32 Iowa 1986).

The Court referred to the adoption of the comparative fault act and the 1987 amendment, which added a special provision to prohibit an injured worker from recovering twice for the same industrial injury. See Section 668.14. Both Section 85.22 (in a limited situation) and Section 668.14 (in a broader sense) are limitations on the collateral source rule.

The trial court attempted to deal with the inconsistency between compelling the injured worker to pay back his benefits from his recovery and, at the same time, having the jury reduce his recovery because of them. The trial court cited Iowa Rule of Evidence 402 (all irrelevant evidence inadmissible) as its reasoning for excluding the evidence. Schonberger based his argument in favor of the exclusionary ruling on the premise that State programs are exempted from the sweep of Section 668.14. The Court refused to interpret the statute literally and chose instead to rely upon its interpretation of legislative intent. The Court noted that a literal interpretation of 668.14 would produce an absurd and unwanted result. Under 85.22, Schonberger must repay from his recovery his workers' compensation insurer any benefits he has received. The Court noted that the only conceivable purpose of informing the jury of those benefits is to invite the jury to reduce his recovery because of them. However, to any extent the jury would reduce the damage award because of the benefits, the Court concluded Schonberger would be in effect paying not once, but twice. The Court concluded that this type of double reduction is not the result the legislature could have intended.

In order to avoid such an inappropriate result, the Court interpreted the statute so as to deem its requirements satisfied when the requirements of Section 85.22 are complied with. The Court remanded the case to district court for a proceeding in which it must be established that the proceeds of any recovery received by Schonberger are pledged to reimburse his workers' compensation insurer in accordance with Section 85.22. Upon such a showing, the judgment of the trial court would stand affirmed. Hence, the Court ruled that the trial court properly excluded evidence of collateral payments, despite the express language of 668.14.

The Schonberger case contains an interesting dissent by the Chief Justice, wherein he attacks the majority for setting aside what he believed to be the clear terms of 668.14. The dissent points out that the majority's opinion actually fully reinstates the judicially created collateral source rule by the use of Iowa Rule of Evidence 402, at least in cases where collateral benefits were paid subject to a statutory right of subrogation. The Chief Justice went on to provide an alternative analysis which left intact partial alteration of the collateral source rule. The dissent analyzes the development of 668.14 and refers to the express language of the same which provides:

"1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or members of the claimant's immediate family.

"2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

"3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

"4. This section does not apply to actions governed by section 147.136. [Medical malpractice cases.]" (Emphasis added).

The dissent assumed that workers' compensation benefits are not paid pursuant to state or federal programs within the meaning of 668.14(1).

The dissent worked through the statute on a literal basis showing how the evidence would be permitted and concluding that the legislature intended to change the evidentiary portion of the judicially created collateral source rule. In other words, the statute would allow the fact-finder to consider all of the facts concerning payment of the plaintiff's losses. The dissent also noted that double dipping, which occurs in cases where the plaintiff receives collateral benefits which are not subject to subrogation, should be avoided and indicated that an appropriate result could be achieved through the use of appropriate jury instructions and special interrogatories.

For example, the Chief Justice would allow evidence of collateral benefits to be admitted into evidence under subsections 1 and 2 of 668.14. Under subsection 3, the jury would be instructed that if it finds liability, it must determine whether any of the plaintiff's claimed damages were or will be paid by collateral sources, and, if so, how much. The jury would then be required to determine whether or not any collateral sources were subrogated to the plaintiff's recovery from the tort defendant. Next, the jury would be instructed that if it finds that such rights of subrogation do exist, the plaintiff's recovery from the defendant may not be reduced by the amount of those collateral benefits. Finally, the jury would be asked to state the amount of economic losses of the plaintiff that were or will be paid by collateral sources and which are also included in its jury award to the plaintiff. Thus, double dipping would be avoided. It appears that the dissent does provide a framework within which 668.14 could work and has a less extreme effect than that of the majority.

B. IOWA COURT OF APPEALS

1. Heart Attack

Dept. of Transp. v. Van Cannon, 459 N.W.2d 900 (Iowa App. 1990).

Van Cannon suffered a heart attack while at work and in the course of employment. The Industrial Commissioner awarded permanent total disability benefits and the district court upheld the same. The claimant's employer, the Iowa Department of Transportation, appealed.

The agency found that while at work, the plaintiff (1) was required to make heavy exertions; (2) the exertions were greater than that of nonemployment life; (3) the exertions aggravated and accelerated Van Cannon's pre-existing coronary disease; (4) the aggravation required the plaintiff to undergo heart surgery; (5) a stroke occurred during surgery; (6) the claimant is permanently and totally disabled from the stroke. Based on the above, the agency concluded that the plaintiff was entitled to permanent total disability benefits.

On appeal, the DOT claimed that the agency decision was not supported by substantial evidence and that it was contrary to law and an abuse of discretion. The Iowa Court of Appeals affirmed the agency's decision.

The medical experts for the claimant had testified that the work performed by the claimant aggravated the pre-existing disease while doing fairly heavy exertion in a rather cold environment.

The employer had focused on the pre-existing condition or disability of the claimant. The claimant began having heart problems three months prior to the alleged work injury. However, the claimant was diagnosed as symptom free two weeks before the injury.

The Court summarized the Iowa law concerning well-established principles that if a claimant has a pre-existing condition or disability that is aggravated, accelerated, worsened or "lighted up" by an injury which arose out of and in the course of employment resulting in a disability found to exist, that claimant would be accordingly entitled to compensation. The Court also gave great weight to the expert testimony.

The Court examined the Iowa law concerning the ability of a claimant to receive compensation when a pre-existing circulatory or heart condition exists. The Court outlined two types of situations wherein compensation is justisfied. The first situation is when the work ordinarily requires heavy exertions which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury. See Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945). The Court noted that the claimant in such a case would be aided by the liberal rule permitting compensation for personal injury, even though it does not arise out of an "accident" or "special incident" or unusual occurrence." The Court also cited Larson's treatise for support of the Littell rationale.

The second situation referred to by the Court allows compensation when the medical testimony shows an instance of unusually strenuous employment exertion, imposed upon a pre-existing disease condition, which results in a heart injury, citing Guyon v. Swift & Co., 229 Iowa 625, 295 N.W. 185 (1940).

The Court affirmed the decision awarding permanent total disability benefits, finding that the medical and other evidence constituted substantial evidence.

2. Extent of Injury

Oscar Mayer Foods Corp. v. Wuebker, 456 N.W.2d 226 (Iowa App. 1990).

The claimant suffered a knee injury in 1979 and accepted benefits equivalent to a 7.5 percent permanent partial disability due to the loss of strength and stability in the knee. Four years later, the claimant reinjured his left knee while performing his job. The further injury resulted in a 23 percent permanent partial impairment. One year later, the claimant experienced pain in his neck and it was determined that he had a herniated disk which required surgery that year.

The Deputy Industrial Commissioner determined that he was entitled to permanent partial disability benefits for the reinjury to his knee, but only temporary disability benefits for the injury to his neck because he did not suffer a loss of earnings due to that injury. Both parties appealed and the Industrial Commissioner determined that the claimant had a 15.5 percent permanent impairment to his knee and a 10 percent industrial disability because of his neck injury.

On Petition for Judicial Review, the district court reduced the award for the knee injury to 13 percent and concluded that the 10 percent industrial disability for the neck injury was not supported by substantial evidence due to a lack of evidence concerning loss of earning capacity.

The Court of Appeals agreed with the Industrial Commissioner and reversed the district court. The 15.5 percent impairment was supported by substantial evidence as the 23 percent rate was reduced by the 7.5 percent rating agreed upon in 1979. The Court also agreed with the Commissioner's finding that the neck injury resulted from his work activity and left intact the 10 percent industrial disability rating awarded by the Commissioner. This finding was supported by a 5 percent impairment rating.

3. Cumulative Injury Rule

Babe v. Greyhound Lines, Inc., 456 N.W.2d 924 (Iowa App. 1990).

The claimant, a ticket and baggage agent for Greyhound, injured his back in 1979 while lifting at work. Later that year, the claimant missed additional weeks of work due to back pain following a lifting incident at work. The claimant experienced further back pain the following year after another lifting incident at work but failed to miss any work as a result.

Two years later, the claimant experienced back pain after lifting at work and missed eight days as a result. The following year, the claimant experienced further back pain as a result of lifting and missed another five weeks of work. The claimant made claims for workers' compensation benefits after each work-related incident. During the course of these problems, the claimant slipped and sustained a back injury in his home.

The claimant was terminated when the employer ceased operations in the local area. Three years after termination, the claimant once again experienced pain in his back and a CT scan indicated that the claimant had sustained a herniated disk which resulted in a five percent total body disability.

The claimant brought an action for arbitration/review-reopening seeking permanent partial disability benefits. The action was based on two work-related incidents from 1982 and 1983. A Deputy Industrial Commissioner found that the claimant had suffered a cumulative injury and this injury caused a significant permanent partial impairment and awarded the claimant permanent partial disability benefits based on a finding of 30 percent industrial disability.

Greyhound appealed to the Industrial Commissioner who modified the Deputy's Decision and concluded that the cumulative injury rule was not applicable in this action. The Commissioner found the subsequent injuries to be aggravations of a pre-existing condition and found that the claimant's back injury did not materially change after 1979. No permanent benefits were awarded by the Commissioner; however, the claimant was awarded temporary total disability benefits for two of the work-related injuries. The district court affirmed the Commissioner.

The claimant appealed the decision of the district court, arguing that the Commissioner should have applied the cumulative injury rule. The Court stated that the cumulative injury rule applies when a disability caused by work activity developed gradually over a period of time. The Court stressed that the cumulative injury rule should be used when there is a gradual deterioration of the employee's condition and differentiated that type of situation from the separate and distinct incidents of back strain sustained by Babe, the claimant. The Court further noted that the cumulative injury rule was adopted as a narrow exception to the potentially harsh effects of the statute of limitations where the disability developed in a subtle, gradual fashion. Accordingly, the Court agreed with the Commissioner's interpretation and sustained the district court.

4. Subrogation

Meck v. Iowa Power & Light Co., 469 N.W.2d 274 (Iowa App. 1991).

The claimant, a GE employee, was injured while working in an Iowa power plant pursuant to a contract between General Electric and Iowa Power. The claimant recovered a substantial judgment against Iowa Power, who appealed. Iowa Power also contended it should have been given an offset credit for an $80,000.00 workers' compensation settlement received by the plaintiff. Iowa Power also

claimed error based on the exclusion from evidence of a copy of the workers' compensation settlement agreement.

This case focuses on the potential for double recovery under Section 85.22 of the Iowa Code. Eighty thousand dollars was paid in settlement for the claimant's workers' compensation claim. Accordingly, the Court held that the claimant's employer had a valid subrogation lien against the plaintiff's recovery up to the extent of its payment, provided it had filed the necessary notice of the lien in the action at bar. Based on a properly filed workers' compensation lien, the reduction of the award would ensue and double recovery by the claimant would be avoided.

The Court cited Schonberger, reviewed elsewhere in this outline, wherein the Supreme Court affirmed the trial court's exclusion of evidence of workers' compensation benefits.

The Court concluded that to inform the jury of the $80,000.00 workers' compensation award would invite the jury to reduce the claimant's award by that amount. The Court noted that this was apparently what Iowa Power desired. However, citing the Section 85.22 subrogation requirement, the Court disallowed such a result and affirmed the trial court.

5. Healing Period--Review-Reopening Decision--Change in Condition

Hall v. Backman Sheet Metal, 470 N.W.2d 52 (Iowa App. 1991).

Claimant was awarded 32 percent permanent partial disability benefits relative to the right hand in a Decision filed by the Deputy Industrial Commissioner on February 25, 1985. From February 25, 1985, until July 16, 1985, claimant received further conservative treatment from his doctor in the nature of electrical stimulation. When this proved unsatisfactory, claimant underwent surgery on this hand and subsequently received a 20 percent permanent partial disability rating from his doctor. The employer refused to pay healing period benefits for the period of "conservative" treatment prior to the surgery. The Deputy Industrial Commissioner held that the claimant was entitled to additional healing period benefits. In addition, the Deputy Industrial Commissioner held that the defendants had overpaid permanent partial disability benefits and reduced the award of permanent partial disability benefits to 20 percent.

The Industrial Commissioner concluded that the claimant failed to carry the burden to intiate review-reopening proceedings. The Court of Appeals held that no showing of a change of condition was necessary because the claimant did not seek to relitigate prior proceedings as the "conservative" treatment constituted new and distinguishable benefits which were administered in anticipation of some significant improvement. The Court of Appeals left undisturbed the Deputy Industrial Commissioner's finding that the claimant was entitled to credit for overpayment of permanent partial disability benefits.

C. UNPUBLISHED APPELLATE COURT DECISIONS

1. Weight of Physician's Opinions

Lithcote Company v. Ballenger, (Iowa Court of Appeals, No. 90-46(0-463), April 2, 1991).

The district court affirmed the disability award granted by the Industrial Commissioner. The employer appealed, claiming that the district court erred in finding that the employee had injured two lumbar disks rather than one on the date of his injury and in determining the length of the healing period. The employer also challenged the affirmation of the excessive award of industrial disability.

The Court agreed that substantial evidence supported the finding of injury to two disks, citing the opinions of two physicians confirming that two disks had been injured. The Court noted that the Commissioner was unable to determine from the physicians' opinions when the claimant had reached maximum medical improvement. Thus, the Commissioner relied upon the date claimant returned to work to fix the healing period time frame. The Court of Appeals affirmed that analysis and conclusion.

The Industrial Commissioner found that the claimant had a 20 percent functional impairment of the body as a whole due to his back problems caused by the fall and awarded 30 percent permanent partial industrial disabilty. The Court of Appeals noted the claimant's limited, formal education, his entire work history, and loss of earning capacity. The Court of Appeals agreed with the district court and affirmed.

A dissent criticized the opinion because both the Industrial Commissioner and district court failed to give reasons for their interpretation of the physicians' opinions. The dissenting justice was disturbed primarily by the fact that the Commissioner and district court followed the conclusions of two doctors who were hired to independently evaluate the claimant. It was noted that the treating physician and the operating surgeon had differing conclusions and that their opinions should have been given more weight.

2. Dismissal--Attorneys' Actions

Konz v. University of Iowa, (Iowa Court of Appeals, No. 89-1648, February 26, 1991).

Employee Konz appealed from a judgment affirming the Industrial Commissioner's ruling that upheld a Deputy Commissioner's order dismissing without prejudice the claimant's medical benefits claim against the University of Iowa and the State of Iowa. The Deputy Commissioner dismissed the claim after Konz' attorney failed to appear at a prehearing conference and failed to respond to an order to show cause. Konz' original attorney inadvertently failed to ensure that Konz' second attorney received complete information and notices.

The claim was dismissed pursuant to agency rule 4.36 (failure to comply with an order). Under Iowa Rule of Civil Procedure 230, which the agency has adopted, the Court held that this would amount to a default judgment. Rule of Civil Procedure 236 provides that the claim may be reinstated for good cause, including mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty.

The Court of Appeals held that the agency abused its discretion by blurring the distinction between sound reasons and mere excuses. The Court believed the agency was preoccupied with the delay in prosecuting the claim but that it ignored the reasons for keeping the case inactive, such as the pending civil suit.

The Court held that the order virtually ignored the true purpose for its issuance, the failure to appear or show cause. The Court concluded that, in any event, the claimant should not be penalized for the errors of the attorneys.

3. Aggravation of Pre-existing Condition--Causation

Sheller-Globe Corporation v. Atterberg, (Iowa Court of Appeals, No. 90-224, April 2, 1991).

The claimant injured her back while working for Sheller-Globe and the Industrial Commissioner determined that she had a five percent industrial disability from a previous nonwork-related injury and a 45 percent industrial disability after the work-related injury. On judicial review, the district court affirmed the Commissioner and the employer appealed. The employer

claimed that the injury did not arise in the course of the claimant's employment and that the award of the industrial disability was excessive.

The Court reviewed the standard test that if a claimant had a pre-existing condition or disability which was aggravated, accelerated, worsened, or "lighted up" by an injury which arose out of and in the course of employment resulting in a disability found to exist, he or she would accordingly be entitled to compensation. The Court noted that as long as there is a causal relationship between the employment and the injury, the injury would be deemed to arise out of the employment. The Court further noted that it only needs to be one cause, it does not have to the only cause.

The evidence indicated that the claimant had been performing work which required a high rate of speed and that such work should have been performed by more than one person. The hearing officer determined that based on the claimant's description of her activities before and after she returned to work, plus the medical testimony of the physicians who had examined her, her present condition was caused by her congenital back condition resulting from a 1985 fall and the type of work she was performing at the time of the latest injury. Accordingly, the Court of Appeals found there to be substantial evidence to support the Commissioner's finding.

The Court of Appeals also affirmed the 40 percent industrial disability award, citing the claimant's minimal education and lack of advanced technical training beyond manual labor intensive jobs. Further, the Court cited the poor, local economy and the fact that the employer refused to re-hire the claimant, even though there was evidence that jobs would be available that would not be as stressful or aggravating to her existing condition. Moreover, the claimant was highly motivated in looking for work.

4. Gross Negligence of Co-employee

Overton v. Brisker, Lewis and Northstar Steel Company, (Iowa Court of Appeals, September 26, 1990).

This gross negligence case was brought on the theory that one of the co-employees was working in a managerial capacity and, accordingly, acting within the scope of his employment.

The district court granted the employer's motion for summary judgment, correctly noting that the plaintiff's exclusive remedy was workers' compensation. The plaintiff had asserted common law theories of tort recovery and the court pointed to the legislative preemption of case law where employees of the same employer injure each other in the course of employment.

The case proceeded to trial against the co-employees and the court granted the defendant's motion for a directed verdict, holding that the plaintiff failed to produce substantial evidence to support a claim for gross negligence. The court noted that a claim for gross negligence must show that the injury is probable and not just possible and that the defendants acted in disregard of the peril.

At the review-reopening hearing, the Deputy Industrial Commissioner held that the claimant was entitled to additional healing period benefits. However, the Deputy felt that the defendants had overpaid permanent partial disability benefits and reduced the award of permanent partial disability benefits to 20 percent. The Industrial Commissioner concluded that the claimant failed to carry the burden required to reopen the award for additional payments and the claimant sought judicial review of that Decision. The district court affirmed the Decision of the Commissioner.

5. Heart Attack

Iowa State Penitentiary and State of Iowa v. Duffield, (Iowa Court of Appeals, No. 89-1305, October 23, 1990).

Claimant was employed as an electrician by the Iowa State Penitentiary. He had a pre-existing diseased heart. While being questioned by superiors about staff misconduct, he complained of chest pains. Later the same day, the claimant suffered a myocardial infarction.

The Court of Appeals found that there was substantial evidence to support the Industrial Commissioner's award. Claimant was of the type that would be threatened by the investigation. Claimant was aware that several other employees called in for investigation had been terminated. The Court of Appeals found that stress emanating from the investigation procedure was stress not found generally in non-employment life situations, and this aggravated claimant's existing heart condition. The Court further noted that an employee's claim for benefits based on job stress will be judged on a case-by-case basis.

6. Permanent Partial Disability--Odd Lot

Armstrong v. Iowa Department of Buildings and Grounds, (Iowa Court of Appeals, No. 89-1817, October 23, 1990.

The claimant was a custodian for the Iowa House of Representatives and was injured in 1978 and underwent double hernia surgery. The Commissioner awarded a ten percent permanent partial disability and the Decision was affirmed by the Supreme Court. See Armstrong v. State of Iowa Bldgs., 382 N.W.2d 161, 167 (Iowa 1986). On December 8, 1981, the claimant filed a Petition for Review-Reopening, asserting that his condition had deteriorated since his original petition and that he should be considered an odd-lot employee. The claimant had recurrent hernia repair surgery in March of 1986. The Industrial Commissioner found that any change in the claimant's earning capacity was not proximately caused by his 1978 injury. The district court reversed and found that the odd-lot doctrine applied.

The Court of Appeals affirmed the district court's decision awarding permanent disability benefits but reversed the district court with regard to the decision the claimant made a prima facie case for odd-lot doctrine. Expert testimony at the hearing established that the disability from the hernia was a substantial factor in the disability of the claimant.

Relative to odd-lot, the Court of Appeals held that the claimant failed to present evidence to show that he made even a reasonable effort to look for employment. Because the claimant did not present evidence with regard to employment or his attempts to obtain the same, he did not make a prima facie case under the odd-lot doctrine.

7. Pleading

Keeney v. Wilson Foods Corporation, (Iowa Supreme Court, No. 89-823, Per Curiam, March 20, 1991).

The claimant suffered back injuries occurring in 1981, 1982, and 1984 while employed with the defendant. The claimant's fourth back injury occurred in March of 1985 after the plant had been sold. The claimant received benefits for each of his work injuries. Three separate Petitions for Review-Reopening involving the first three injuries were dismissed by the Industrial Commissioner upon a finding that none of

the claimant's first three injuries were permanent. The claimant failed to specially allege that the prior injury was a proximate cause of the fourth injury in any of his petitions nor did he make reference to the fourth injury. Consequently, the Industrial Commissioner did not reach this issue. However, the Court held that the claimant's petition was sufficient to present the theory that the claimant sought to have adjudicated, referring to notice pleading, and that the Commissioner's language had suggested that the claimant had made his claim known. The case was reversed and remanded to the Commissioner.

8. Peace Officer's Disability

Miller v. Iowa Peace Officers' Retirement, Accident and Disability System, (Iowa Supreme Court Per Curiam, December 19, 1990).

Under Section 97A.6(5) (1989), a law enforcement person "who has become permanently and totally incapacitated for duty as the natural and proximate result of an injury, disease or exposure occurring or aggravated while in the actual performance of duty at some definite time and place..." may be entitled to benefits. Claimant asserted that he was totally disabled due to a loss of hearing, stress related digestive and sleep problems and a loss of stamina.

The Court rejected the claim, stating that the claimant had failed to carry his burden and noted that he had an incredible task in trying to persuade the administrative agency that his factual claim would qualify him for benefits. The Court noted that once the administrative agency had denied his award, his burden became impossible on judicial review. In order to render the dispute a strictly legal one, the claimant would have needed to show reasonable minds could reach only one conclusion from the proven facts. The Court held that reasonable minds could conclude that the claimant was not totally and permanently disabled and, further, that reasonable minds could also conclude that the claimant was unable to trace his health problems to a specific incident occurring in the line of duty.

II. INDUSTRIAL COMMISSIONER

1. Offer to Confess Judgment

Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (Ruling on rehearing October 23, 1990).

Defendants made an offer to confess judgment to claimant at the beginning of the hearing which the claimant refused. The claimant was awarded an amount greater than the offer in the Deputy's Decision. However, on appeal, the medical expenses were disallowed, making the final agency award less than the offer to confess judgment. On rehearing, costs incurred after the offer to confess judgment was made and refused were assessed to the claimant.

2. Refusing Medical Treatment--Reasonableness

Hardy v. Abell-Howell Company, File No. 814126 (Appeal Decision, December 21, 1990).

Claimant refused to undergo surgery or epidural block for his back condition. The defendants requested a reduction in benefits due to this refusal. At issue was whether or not a reduction in benefits was justified as being unreasonable. In order to determine if a refusal is unreasonable, a balancing test is used wherein the risks of the procedure are compared to the predicted benefits. In this case, both physicians testified that even with surgery, the claimant would still have significant restrictions. Additional medical evidence was presented to indicate to what degree the claimant's impairment would have been improved had he undergone successful surgery. Accordingly, the Commissioner concluded that the claimant's refusal was not so unreasonable as to justify a reduction in benefits.

3. Voluntary Dismissal

Matheson v. John Deere Des Moines Works, File No. 877064 (Appeal Decision, October 25, 1990).

This case examined Rule 215 concerning dismissal of a contested case. Prior to the commencement of a hearing, a party could voluntarily dismiss their contested case without the consent of the Industrial Commissioner. However, parties in a hearing may not voluntarily dismiss their case without approval of the Deputy presiding over the contested case. Because

the trial had begun, the Deputy had the authority to determine whether the claimant's voluntary dismissal should be allowed. The matter was remanded to determine whether the Deputy would consent to the claimant's motion to dismiss.

4. Heart Attack--Exposure to the Elements

Neil v. John Deere Component Works, File No. 756209 (Appeal Decision, August 30, 1990).

The Commissioner reviewed the Supreme Court's position concerning the appropriate standard to determine whether there is a work-related connection between decedent's injury and subsequent death and a pre-existing heart condition. The claimant had argued that she was entitled to death benefits under the "positional or actual risk" doctrine. The Commissioner referred to the Supreme Court case of Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990), wherein the Court adopted the actual risk rule in workers' compensation cases involving injuries from exposure to the elements. However, the Court in Hanson limited its holding to cases involving exposure to the elements. Accordingly, the Commissioner ruled that the claimant's reliance upon Hanson was misplaced as Hanson involved a death following heat stroke.

Evidence was introduced that conditions at the plant where the decedent worked were hot and not air-conditioned. However, although the work conditions were not ideal, the record did not indicate that the work conditions or decedent's work subjected him to a greater risk of injury or harm from his pre-existing condition than would have been found in normal, non-employment life. (Appeal to district court; pending).

5. Mental-Mental

Stouffer v. Swift Independent Packing Company, File No. 814736 (Appeal Decision, December 20, 1990).

In this mental-mental claim, the Commissioner stated that the claimant must prove that he had sustained an injury which arose out of and in the course of his employment with defendants. First, the claimant must prove factual causation between his employment and his alleged injury. Although the medical evidence established that the claimant suffered from a biochemical disorder, the claimant failed to prove factual causation. The Commissioner noted that even if the claimant had

established factual causation, the claimant would have also been required to prove legal causation. In order to do so, claimant must prove that the job created greater stress and tension than all employees would experience in a similar work place, citing Ohnemus v. John Deere Davenport Works, Appeal Decision, February 26, 1990.

Evidence was submitted concerning the claimant's stressful home life. Thus, the Commissioner held that the claimant failed to prove legal causation between his alleged injury and his employment.

6. Effect of a New Position--Loss of Earning Capacity

Davis v. Des Moines General Hospital, File No. 820525, (August 8, 1990).

The claimant sustained a work-related back injury and underwent surgery for a herniated disk. The claimant's treating physician placed restrictions upon her and her activities. Subsequently, she was placed in a new position with the same salary that she had prior to her injury and the same opportunity to advance. However, these circumstances did not preclude a finding that the claimant had experienced a loss of earning capacity. The Commissioner cited Elderkamp v. Archer Danies Midland, Appeal Decision, May 31, 1990, that stated "loss of actual earnings does not equate to loss of earnings or lack thereof. Functional impairment is only one component of earning capacity. Claimant's restrictions limit his ability to secure a position for which he is qualified." Because the claimant had lifting restrictions, the Commissioner concluded that the restrictions limited the claimant's ability to return to her duties as a nurse's aide.

7. Discovery

Toftee v. Webster City Products, File Nos. 686176/814729 (Appeal Decision, January 30, 1991).

Defendant sought to prevent the introduction of records and reports from certain doctors and hospitals on the ground that the defendant was unable to schedule a time to take a particular doctor's deposition prior to hearing. It was determined that the claimant's right to introduce medical evidence is not contingent upon the defendant's ability to depose the physician. The defendant's failure to obtain the deposition of the doctor was not considered a valid ground to exclude medical evidence of the claimant who had complied with all of the agency rules and orders.

8. Penalty Under 86.13

Stanley v. Wilson Foods Corp., File No. 753405 (Appeal Decision, August 23, 1990).

The standard under 86.13 relative to penalties is whether or not the claimant's claim is fairly debatable. Where defendants assert a claim that is fairly debatable, they are not acting unreasonably in the denial of payment. Seydel v. U of I Physical Plant, Appeal Decision, November 1, 1989. In this case, the claimant was awarded 3.75 additional weeks of compensation due to the defendant's refusal to pay even the lowest impairment rating given by the defendant's selected physician. The medical evidence was undisputed and a causal connection between the injury and the claimant's work was established. All physicians agreed that some permanent impairment resulted from the injury. There was no evidence in the record to suggest that the existence of such an impairment could not have been discovered through the exercise of reasonable diligence or reasonable investigation at the time the claimant returned to work. It was noted that only a minimal amount of effort would have been required to simply ask the claimant's treating physician whether or not any permanency had resulted, and, if so, how much. (No appeal.)

9. Rate

Tuttle v. Mikow Corp., File No. 672377 (Remand Decision, January 18, 1991).

The Decision examined rate after D & C Exp., Inc. v. Sperry, 450 N.W.2d 842, 845 (Iowa 1990). Decedent's actual expenses were not known. Accordingly, the rate was determined pursuant to Section 85.36(8).

The general manager testified that the amount paid the owner operator represented equipment rental and no part of the monies paid the drivers represented compensation for driving the truck, a result which was found to be absurd.

Decedent's gross receipts for 13 weeks before the accident were computed, excluding fuel surcharges pursuant to 85.61(12). Decedent's average gross receipts were determined by dividing gross receipts by 13 weeks. One-third of the decedent's average gross receipts represents decedent's earnings from operation of the truck. Claimant, decedent's wife, as co-driver of the

decedent's truck, furnished 42 percent of the labor. Earnings from decedent as driver of the truck represent 58 percent of the earnings from the operation of the truck. (Appeal to the district court; pending.)

10. Change of Condition--Settlement

Spence v. Griffin Wheel Co., File No. 667226 (June 19, 1990).

The claimant suffered an injury that resulted in the amputation of his toes on one foot. This was alleged to have caused an alteration to his gait, which in turn resulted in back pain. The claimant also alleged mental problems as a result of his injuries and entered into a settlement that enumerated only the loss of his toes. Later, the claimant sought review-reopening to obtain benefits for the back and mental injuries. It was held that the settlement contemplates all known conditions in existence at the time of the settlement, whether they are enumerated or not. "Contemplated" does not merely mean listed in the settlement papers. Thus, where claimant knew of his back and mental problems at the time of the settlement and knew they were related to his work injury but nevertheless chose to settle the case on the basis of his amputated toes alone, he in effect decided to forego compensation for those conditions. The ruling held that our law does not contemplate partial settlements. A settlement is not a physical document, but an agreed determination of all manifested effects of a work injury at a given point in time. Thus, whether they physically appear in the settlement documents or not, all claimant's known effects of the injury in existence at the time of the settlement are by operation of law "contemplated" by the settlement. (Appeal to the district court; pending.)

11. Cumulative Injury; No Apportionment

Voshell v. William Roys Remodeling, File No. 805465 (Appeal Decision, February 27, 1991).

The claimant worked for the first employer and experienced wrist pain just a couple of days before leaving that employment. Claimant then went to work for a second employer, where the pain continued and worsened. Eventually, the claimant was found to have suffered a cumulative injury. It was held that the evidence established claimant's condition was caused by his first employment and aggravated by the second employment. However, no apportionment was appropriate

since there was no identifiable disability during the first employment. Because there was no apportionment, the second employer was liable for the disability the aggravation had caused. (No Appeal.)

12. Attorneys' Fees--Commutation

Webb v. Lovejoy Construction Co., File No. 474988 (September 25, 1990).

The claimant's attorney successfully obtained an award of benefits for claimant based on a 25 percent industrial disability, but only after two successful appeals to the Supreme Court and numerous hearings. The claimant then changed attorneys. In a ruling on attorneys' fees, the claimant's first attorney was found entitled to one-third of the benefits accrued to that date, and one-third of future benefits received. The claimant's second attorney obtained a commutation of benefits, based on 95 percent industrial disability, and claimant's first attorney applied for one-third as a fee. On appeal, it was held that normally, where a commutation represents no change in the award itself, but merely the manner of payment, the original attorney would be entitled to one-third of the commuted funds. However, since the commutation was for 95 percent instead of 25 percent industrial disability, it was possible that the claimant's second attorney had, in addition to obtaining a change in the manner of payment of the award obtained by the first attorney, also obtained an increase in the award for the claimant. The claimant's first attorney would not be entitled to one-third of that portion of the commuted benefits obtained not by the first attorney's efforts, but by the efforts of the second attorney. This was remanded to the Deputy to determine what portion of the commuted benefits are attributable to the efforts of the first attorney. (No Appeal.)

13. Burden of Proof--Causal Connection

Spalding v. Emco Industries, File No. 892690 (August 10, 1990).

The Commissioner held that the claimant bears the burden of proof to submit and establish appropriate medical evidence concerning her injuries. In this case, the x-rays taken shortly after claimant's injuries showed no fractures. However, x-rays taken several months later showed a healing fracture. Although the claimant testified herself concerning the lack of intervening situation that might account for the fracture, no medical evidence was proffered to show why the fracture did not show up on the earlier x-rays.

It was also held that even if the fracture had been shown to be causally connected to her work injury, the claimant had failed to show permanency. The Commissioner leaned toward the testimony of the two treating physicians who claimed that there was little or no permanent impairment. The examining physician opined that there was a 15 percent permanent impairment to the arm. However, the Commissioner relied upon treating physicians who had more contact with the claimant and her condition and gave those opinions greater weight. (Appeal to the district court; pending).

14. Reasonableness of Medical Bills

Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (July 31, 1990).

This case revolved around evidence necessary to establish whether or not medical bills were reasonable. Although the bills were submitted into the record and described by the claimant as being required for his treatment, the claimant put on no evidence that the charges for the services were reasonable. The claimant had established that the medical expenses were authorized and causally connected but was denied reimbursement for medical expenses due to his failure to meet his burden of proof relative to the reasonableness of the services. (Appeal to the district court; affirmed).

15. Constitutionality--Scheduled Members

Spalding v. Emco Industries, File No. 892690 (November 28, 1990).

Constitutional challenge to the scheduled member provisions of the Iowa workers' compensation law. Held that the agency lacked authority to determine the validity of statute. Also, that the constitutionality of the challenged sections had already been determined by the Iowa Supreme Court. (Appeal to the district court; pending).

16. Medical Evidence

Bradley v. Allen Memorial Hospital, File No. 847287 (November 30, 1990).

The claimant was injured while an employee of a hospital and his treating physician had staff

privileges at that hospital. It was held that even though there was a showing of financial interest in the hospital, the mere fact of staff privileges did not impeach the physician's credibility. The treating physician's rating was given greater weight than a rating by an examining physician due to the treating physician's greater contact with the claimant, and the opportunity to make an internal examination during surgery. (Appeal to the district court; pending).

17. Permanency Requirements

Little v. Bondurant-Farrar Community Schools, File No. 873368 (January 9, 1991).

Claimant, a custodian, experienced back pain while working. The medical testimony did not establish permanent impairment but only myofascial pain or "sore muscles". Even though it was established that the myofascial pain might continue if she continued in her employment, the evidence established that the claimant's condition was caused not by a cumulative injury, but by the fact that the work was too strenuous for her. Accordingly, in the absence of permanent impairment, claimant was entitled to temporary disability benefits only.

The conduct of the employer was examined pursuant to Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), to determine if an industrial disability award might have been appropriate even in the absence of permanency. However, the record reflected that the employer had tried to accommodate the claimant with light-duty work and permanent disability benefits were denied. (Appeal to the district court; pending).

18. Procedure--Motion for Continuance

McIntire v. Super Valu Stores, Inc., File No. 776428 (January 31, 1991).

Hearing was scheduled for March 1, 1989, on which date the claimant's attorney appeared at 1:30 p.m. and moved for a continuance because his client was not present. No affidavits or sworn testimony was offered in support of his motion, which was duly denied.

Rule 183 of the Iowa Rules of Civil Procedure require that a motion for continuance based on evidence must be supported by affidavit. The Deputy did not abuse his discretion in denying the motion. No good cause

was advanced for the continuance other than the supposed confusion of claimant and the denial of the motion for continuance by the Deputy Industrial Commissioner was affirmed. (No Appeal).

19. Procedure--Res Judicata

Cook v. Iowa Meat Processing Company, File No. 727578 (October 31, 1990).

The claimant was awarded 20 percent disability based on an injury to his left arm. Later, the claimant filed a petition in arbitration, which named the Second Injury Fund as a defendant and claimed industrial disability benefits based on the injury to the left arm and a prior loss of the right arm. The claimant also filed a review-reopening petition for the left arm.

The matter was remanded from district court and the Industrial Commissioner held that the original arbitration decision determination that the claimant's left arm condition was 20 percent impairment of the arm did not extend into the body as a whole and was not res judicata as to the Second Injury Fund in the second arbitration action, as the Fund was not a party to that action. However, the insurance carrier and employer were bound by that determination in the second arbitration action as they were parties in the original action and did participate.

It was also held that the original arbitration determination that the injury did not extend to the body as a whole was not res judicata as to the employer and insurance carrier in the review-reopening action. The holding focused on when the disability arose. In other words, the original arbitration decision determined the claimant's disability as of the time of the arbitration hearing. However, the later action in review-reopening focused on the claimant's disability at a later point in time. Thus, the nature and extent of the claimant's left arm disability at the time of the review-reopening hearing needed to be newly determined, both as to the liability of the Second Injury Fund and the employer and insurance carrier for the second injury. It was held that the injury was confined to the left arm. Although claimant complained of pain in his shoulder, it was held that "[p]ain alone is insufficient to extend an injury from a scheduled member to the body as a whole." The claimant was awarded Second Injury Fund benefits based on a cumulative industrial

disability of 75 percent. The claimant had a 62 percent disability of the right arm and 20 percent disability of the left arm. The Fund received credit for the combined total of the disabilities to the arm. (Appealed but later settled.)

20. Rate

Hardy v. Abell-Howell Company, File No. 814126 (December 21, 1990).

The claimant worked for the employer for 13 weeks prior to the injury. However, during three of those weeks, the claimant was laid off and earned no wages. Another week, the claimant worked only one day and was then laid off. Another week, the claimant also only worked one day and was off sick for the rest of the week.

In determining the claimant's gross wages, weeks where the claimant was laid off were not counted; weeks where claimant worked part of the week and was laid off part of the week were counted, however. The week where the claimant was ill is unrepresentative of claimant's actual earnings and was not utilized. This left nine representative weeks which, under 85.36(7), would be less than the 13 representative weeks. Accordingly, the rate is figured on the basis of what the employee would have earned had he been employed 13 weeks. The record lacked evidence of what those wages would have been and the argument that wages with a prior employer should be used was rejected in light of the language of 85.36(7). The rate was calculated under Barker v. City Wide Cartage, 1 Iowa Industrial Commissioner Report 12, 15 (Appeal Decision, 1980), by dividing his total earnings over the nine representative weeks by nine. (Appeal to district court; pending.)

21. Extent of Disability--Unauthorized Medicals

Thomas v. Broadlawns Medical Center, File Nos. 812401 & 716036 (Appeal Decision, October 31, 1990).

Claimant's permanent partial disability resulting from carpal tunnel snydrome and DeQuervain's disease was found to be of the hand, rather than the arm, based upon a finding that medical records failed to show that the surgical incision or the anatomical situs of the injury extended beyond her hand. It is the anatomical situs of the injury, not the situs of the disability, which is determinative.

Also, it was held that there was not a causal connection between claimant's work and her right carpal tunnel condition where she suffered from left carpal tunnel syndrome and left DeQuervain's disease from a work injury on June 22, 1982, had surgery on the left hand in January and March, 1983, terminated her employment in April 1984, and did not report right hand problem until November 1985. Expert medical testimony indicated that the right hand problems were not related to the left hand injury because of the time between the injury and the right hand complaints.

Further, medical expenses were not compensable where unauthorized and where the claimant failed to prove that the evaluation she received improved her condition.

22. Res Judicata--Independent Contractor

Lowe v. Spencer Brokerage, Inc., Nos. 8251838 & 808341 (Appeal Decision, October 28, 1990).

Defendants contended that prior decision of Industrial Commissioner involving a different claimant and same employer was res judicata in regards to whether an employee-employer relationship existed. The Commissioner found there were factual differences in the two cases, and additionally res judicata would not apply as the claimant in this case was not a party to the prior action.

The Commissioner found that the claimant was an employee, rather than an independent contractor, based primarily on facts that defendant selected and employed claimant at will as a truck driver; that defendant paid claimant compensation; that defendant terminated claimant at will and not pursuant to written contract; that defendant had the exclusive right of control over the work by designating which driver would deliver a load; and that claimant was not engaged in the business of independent trucking and had no business name, business address, or employees. The Commissioner failed to adopt, however, the Deputy's conclusion that the defendant's owner-operator lease agreements, which claimant was forced to sign, were in violation of Iowa Code Section 85.18 and, thus, would not relieve defendant from liability for workers' compensation benefits.

23. Voluntary Dismissal

Teboe v. Continental Bakery, No. 818243 (Appeal Decision, October 30, 1990).

Deputy at hearing properly sustained defendants' objection to admission of evidence on ground that claimant failed to timely serve witness and exhibit lists. Claimant's counsel's incorrect reading of hearing assignment order does not excuse failure to comply with it.

After evidence was excluded, claimant moved to dismiss. In the appeal Decision, it was held that the Deputy had discretion whether to grant claimant's motion to dismiss without prejudice. Once a hearing has begun, the Deputy had authority to determine whether the motion to dismiss should be granted, with or without prejudice.

WORKERS COMPENSATION UPDATE

Part II

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Alternate Dispute Resolution

I. The 1990 legislature mandated in Senate File 2328 that the industrial commissioner adopt rules providing for alternative dispute resolution procedures to avoid the filing of contested cases and to expedite the handling of contested cases, once filed.

II. The commission's rules, effective April 10, 1991, provide for three types of procedures to implement Senate File 2328, including:

A. Informal dispute resolution;
B. Binding arbitration; and
C. Summary jury trials.

The full text of these provisions is reproduced in Appendix A. Their key provisions are summarized in the following sections.

III. Pre-contested case filing option -- Informal Dispute Resolution. Chapter 10, Iowa Administrative Code.

A. The industrial commissioner or a designee is to be available to resolve disputes prior to the filing of a contested case proceeding, either before or after a first report of injury has been filed. IAC §343-10.1.

1. Employees will be advised by letter of the availability of the informal procedure after a first report of injury is filed.

2. Either party who desires to engage in the informal dispute resolution process may request information regarding the claim from the commissioner's office either by phone or in writing and the commissioner may respond to such information requests either by phone or in writing.

B. All disputed matters concerning entitlement to benefits or whether additional benefits are due may be the subject of informal dispute resolution procedures. IAC §343-10.1(2).

C. Informal dispute resolution may be initiated at any time during the limitation period for filing an original proceeding, but a request for an informal proceeding will not toll the statute of limitations for filing an original proceeding. IAC §343-10.1(3).

1. Either party may initiate an informal proceeding by notifying the commissioner of

its desire to do so.

D. As a prerequisite to participating in any alternative dispute resolution procedure, including the prefiling informal procedure as well as arbitration and summary jury trials (discussed below), the parties must engage in a good-faith effort to resolve their dispute. IAC §343-10.1(4).

1. Counsel for the parties must make a professional statement to the commission or an unrepresented party must file an affidavit to verify that a good-faith attempt to resolve the case has been made.

2. There is a limited exception to the requirement of a good-faith attempt at resolution prior to proceeding before the commissioner when a contested case proceeding is filed in order to toll the statute of limitations. In such a case, the claimant may elect an alternate dispute resolution procedure even if there were no settlement negotiations prior to the filing of the contested case proceeding

E. The pre-contested case informal proceeding is in the nature of a conference which will result in an advisory opinion from the commissioner. IAC §343-10.2.

1. Either party may request an advisory opinion. IAC §343-10.2(1).

2. The request must be in writing. IAC §343-10.2(1).

3. A conference with the industrial commissioner concerning the matter will be scheduled and may be either in person or by telephone. IAC §343-10.2(2).

a. The conference must be scheduled within thirty days of the request for an advisory opinion unless the parties waive the 30-day requirement. IAC §343-10.2(8).

(1) If the commissioner is unable to conduct the conference within 30 days, the file will be closed unless the parties have waived the requirement.

(2) The parties will be deemed to have made a good-faith effort to resolve their dispute prior to filing a contested case proceeding by agreeing to participate in an advisory opinion conference even if they do not waive the 30-day requirement. IAC §343-10.2(8).

4. Ten days prior to the conference, each party must file a written evaluation of its case.

a. The evaluation must identify both strengths and weaknesses of the party's case.

b. The evaluation must indicate whether the claimant is receiving medical or weekly benefits.

c. The commissioner may request additional information from the parties. IAC §343-10.2(1).

5. The conference shall be a maximum of one and one-half hours long with the parties to stipulate as to how the time is to be allocated. IAC §343-10.2(3).

6. At the conference, the parties or their attorneys may present summaries of their evidence and/or the evidence itself.

a. Submissions of evidence must comport with certain technical requirements set forth in IAC §343-4.41 (discussed below).

b. The parties may file a maximum of ten pages each of written evidence in addition to their evaluations or summaries. IAC §343-10.2(5).

7. The parties may not record the conference proceeding. IAC §343-10.2(6).

8. No non-evidentiary materials submitted to the commissioner in an informal conference proceeding may be used in any later proceeding before the commissioner. IAC §343-10.2(6).

F. Issuance and effect of the advisory opinion.

1. The commissioner may either announce his or her advisory opinion orally at the close of the conference or will issue a written report and recommendation within three business days of the conference.

a. If an oral opinion is announced, it will be committed to writing in the form of a report and recommendation and mailed to the parties.

IAC §343-10.2(7).

2. If any party objects to the report and recommendation, the party must file a "notice of no settlement" within 20 days of the commissioner's report.

a. If a no settlement notice is filed, the case will be closed unless and until the claimant files a contested case proceeding.

IAC §343-10.2(7) b.

3. If no objection to the report and recommendation is filed, the matter will be deemed settled according to the terms of the commissioner's report and an order approving the settlement will be entered. IAC §343-10.2(7) a.

IV. Post-contested case filing options - binding arbitration and summary trials.

A. Binding Arbitration. IAC §343-4.42.

1. The parties may elect to engage in binding arbitration after a contested case has been filed and after they have made a good-faith effort to resolve their disputes.

2. The arbitration proceeding may relate to all or only some of the issues involved in the case.

3. All parties must consent, in writing, to the arbitration procedure. IAC §343-4.42(1).

4. The parties may choose any of the deputy industrial commissioners to preside at the arbitration. IAC §343-4.42(1).

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5. The parties have 120 days from the date of the notice of the hearing to complete discovery unless the presiding deputy orders a different discovery schedule. IAC §343-4.42(2).

6. The parties may submit 50 pages of evidence per party in compliance with rule 4.41 (discussed below). IAC §343-4.42(3).

7. No record will be made of the arbitration proceeding. IAC §343-4.42(4).

8. The deputy's decision will constitute a settlement of the case and an order approving the settlement will be entered. IAC §343-4.42(5).

a. If only a portion of the issues is submitted to arbitration, the deputy's disposition of those issues will be binding in all subsequent proceedings in the matter.

9. By electing the arbitration procedure, the parties waive all rights to agency and judicial review and also waive the right to a review reopening proceeding unless there has been a substantial change in condition. IAC §343-4.42(6).

B. Summary Trials IAC §343-4.43.

1. Either party may request a summary trial after a contested case has been filed and after they have made a good faith effort to resolve their disputes.

2. The motion for a summary trial may be made at any time before the case has been set for full trial.

3. Certain cases are not eligible for summary trial, including:

a. Those where the claimant is seeking a weekly benefit for more than 26 weeks.

b. Those removed from the summary trial docket by the industrial commissioner in the interest of judicial efficiency and fairness.

IAC §343-4.43(2).

4. Cases eligible for summary trial include:

a. Claims for medical expenses and alternate care if the employer is not paying such expenses.

(1) Such awards will be made only for the time period commencing with the filing of a motion for a summary jury trial and ending on the earliest of the following dates: approval of a settlement, dismissal of the case, deputy's decision on the full contested case, or 30 days after the contested case hearing. IAC §343-4.43(3)a.

b. Claims for temporary total disability;

c. Claims for healing period benefits;

d. Claims for medical examinations;

e. Claims for vocational rehabilitation benefits;

f. Claims for weekly benefits (rate setting); and

g. Any other issue within the jurisdiction of the industrial commissioner by agreement of the parties and with the consent of the commissioner.

IAC §343-4.43(3).

5. The motion for summary trial must set forth the specific grounds for relief and the rule qualifying such grounds for summary trial treatment as well as the number of weeks of benefits the claimant is seeking. IAC §343-4.43(1).

6. Resistances to a motion for summary trial must be filed within 10 days or the motion will automatically be granted unless the motion accompanies an original notice and petition, in which case the resistance must be filed within 20 days of the filing date. IAC §343-4.43(1); IAC §343-4.43(4).

a. The sole grounds for resistance include:

(1) The matter is specifically ineligible,

under the rules, for summary trial;

(2) The matter is not included in the specifications of eligible cases under the rule;

(3) The parties have failed to comply with the good faith requirements.

b. Resistances must be supported by affidavit.

7. Discovery is governed by the Iowa Rules of Civil Procedure subject to the following limitations:

a. The civil rules do not apply where inconsistent with the commissioner's rules.

b. The movant must serve all written discovery along with the motion for summary trial.

c. The respondent must serve all written discovery within 20 days of the date that the motion for summary trial is granted.

d. Discovery disputes will be ruled on at the time of trial and the parties must be prepared to comply with whatever rulings are made at that time.

e. Discovery deadlines will be strictly enforced and sanctions may be imposed if deadlines are missed.

f. Written discovery is not to be filed with the commissioner.

IAC §343-4.43(5).

8. The summary trial will be scheduled approximately 120 days after the motion for summary trial has been granted.

a. No continuances will be allowed except in the case of illness or emergency.

b. The parties may agree to shorten or lengthen the 120-day time frame.

c. The summary trial must be held

within 240 days of the filing of the motion or it will revert to the regular contested case docket.

IAC §343-4.43(6).

9. Fifteen days prior to the trial the parties must file a joint pretrial report that includes:

a. Statement of facts;

b. Statement of issues;

c. List of each party's exhibits; and

d. List of each party's witnesses.

IAC §343-4.43(9).

10. The summary trial will be a maximum of 2½ hours in length unless the time is increased due to multiple parties or for good cause.

a. Each party will have one hour to present its case.

b. Thirty minutes will be allocated to questioning by the deputy, rebuttal and closing argument.

IAC §§343-4.43(7) and 4.43(8).

11. The trial proceeding is to be informal and the parties may present their evidence in narrative form or by traditional examination of witnesses. IAC §343-4.43(8).

a. The deputy commissioner has discretion to receive any evidence that is not unfairly prejudicial and of which the opposing party has actual or constructive knowledge. IAC §343-4.43(10).

b. Twenty-five pages of written evidence per party may be filed in compliance with rule 4.41 (discussed below). IAC §343-4.43(12).

c. The summary trial will be tape recorded and the parties may obtain copies at their expense. IAC §343-4.43(11).

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12. The deputy may either announce his or her decision orally at the close of the proceeding or issue a written decision within 30 days. IAC §343-4.43(13).

a. If any party objects to the decision, they must file a notice of no settlement within 20 days of the date the decision is filed and the case will then revert to the regular contested case docket. IAC §343-4.43(15).

b. If the parties accept the deputy's decision, a settlement by acquiescence and order approving the settlement will be filed. IAC §343-4.43(14).

V. Rules regarding evidence submitted in informal dispute resolution proceedings. IAC §343-4.41.

A. All evidence must be submitted 10 days prior to the proceeding.

1. Failure to file exhibits in a timely manner will result in a waiver of the right to file exhibits in the proceeding.

B. Exhibits must be in chronological order.

C. Exhibits must be marked.

D. Parties may highlight certain portions of their exhibits.

E. Parties may file summaries of evidence in lieu of submitting the actual evidence.

F. Any illegible documents must be accompanied by a typed translation or they will be disregarded.

G. If a party submits less than the number of pages of written evidence allowed for the particular proceeding, that party's additional page entitlement may be used by the other parties.

H. The use of joint exhibits will not increase the overall page allowances for the parties.

I. Depositions are considered one page in calculating page limits, but deposition exhibits are counted as separate pages.

Case Update: April 1991 - October 1991

Hall v. Backman Sheet Metal, 470 N.W.2d 52 (Ia. App. 1991). Claimant suffered carpal tunnel injuries as a result of his employment as a sheet metal worker in November of 1981. In 1983, following decompression surgery, Claimant reached a plateau in his medical treatment. Permanent partial disability benefits were paid pursuant to an agreement between the parties. Additionally, future necessary and causally related medical treatment was contemplated. In 1983, Claimant, who had been unable to return to work notwithstanding a release to return from his doctor, developed post-operative stiffening and contraction. He sought additional medical benefits in a review-reopening proceeding. The Deputy found that Claimant was entitled to additional medical benefits and increased the level of permanent partial disability. Between the time of the review-reopening decision and the surgery, Claimant was treated conservatively without success. After recovery from surgery in 1985, the level of Claimant's permanent partial disability decreased. The defendant paid the surgical expenses and the post-surgical healing period benefits without objection. They refused, however, to pay healing period benefits for the pre-surgical time period during which conservative treatment was attempted. A second review-reopening proceeding was filed concerning those benefits. The Deputy Commissioner found that the healing period benefits should be paid and also that the Claimant had been overpaid for his permanent partial disability and that the overpayment should be an offset against the healing period benefits. On appeal, the Industrial Commissioner found that there had not been a substantial change of condition that would justify a reopening of the proceeding for an award of additional benefits and reversed the deputy. The district court affirmed the Commissioner. Reversing the district court and Commissioner, the Court of Appeals found that the Claimant was not required to show a substantial change of condition in order to receive the requested healing period benefits since the Claimant was seeking separate benefits based on different evidence but arising out of the original injury rather than trying to relitigate the amount of benefits already awarded. The question of healing period benefits had explicitly not been adjudicated in the earlier review-reopening proceeding. Because the conservative medical treatment administered during the period at issue was for the purpose of significantly improving rather than following up or maintaining Claimant's condition, healing period benefits were found to be appropriate. The Court of Appeals also agreed with the Deputy that defendants had overpaid Claimant's permanent partial disability and ordered an appropriate offset.

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Lithcote Company v. Ballenger, 471 N.W.2d 64 (Iowa App. 1971). The Claimant, who had an eighth grade education and work history of physically demanding jobs, fell from a scaffold while painting railroad cars while in the employ of Lithcote. The Claimant suffered back injury involving his L4-L5 and L5-S1 intervertebral lumbar discs. Claimant underwent numerous medical procedures, including surgery, developed degenerative arthritis, and continued to require pain medication. He was off work from January, 1984 until August, 1985 except for an unsuccessful 5-day attempt to return. He returned to work in a less strenuous position. The defendant challenged whether the injury at L5-S1 was related to the fall. There was conflicting medical evidence on the issue. The Claimant's own treating physician found the L5-S1 injury was unrelated. The Commissioner found that the injuries at both levels were work-related and the district court affirmed. The Court of Appeals also affirmed, finding that the weight to be given to the testimony of the various medical experts, including the treating physician, was for the trier of fact to determine. The Court of Appeals also upheld the award of healing period benefits until the Claimant returned to work. Additionally, the Court of Appeals found the Commissioner's 30% industrial disability rating to be appropriate given the 20% functional impairment to the back combined with Claimant's limited educational and work history.

McKeag v. Mahaska Bottling Company, 469 N.W.2d 674 (Iowa 1991). Claimant's decedent was a corporate pilot for Mahaska Bottling Company. Without the knowledge or permission of the company, McKeag used the corporate airplane to assist an elderly resident of his community in looking for a lost model airplane. During the course of the flight, the company plane crashed and McKeag was killed. The Court affirmed the agency's and district court's denial of benefits on the ground that McKeag's death did not arise in the course of his employment. The Claimant asserted the doctrine of "public goodwill" pursuant to which benefits are recoverable if the worker's actions, although not directly within the scope of the worker's employment, were undertaken to help a customer of the employer. Claimant asks that the doctrine be extended to cover situations where the employer is helping members of the general public and/or potential customers of the employer. The Court did not rule on whether it would be proper to extend the public goodwill doctrine to acts of assistance to the general public under appropriate circumstances. It found, rather, that under the facts of the case, no extension was appropriate due to the clear company rules prohibiting McKeag from using the company airplane for non-company pursuits.

Tallman v. Wausau Insurance Companies, 469 N.W.2d 706 (Iowa 1991). The Court rejected the Plaintiff's claim of bad faith after having reserved ruling on it in an earlier proceeding in the same matter (Tallman v. Hanssen, 427 N.W.2d 868 (Iowa 1988)). The Court stated that since the defendant had paid all medical expenses ordered by the Insutrial Commissioner, defendant could not, as a matter of law, be held in bad faith for failure to pay medical expenses.

This case report will be supplemented with any additional cases that are reported by the date of the seminar presentation.

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APPENDIX A

Item 1 amends rule 343—4.9(17A) to give the Industrial Commissioner more flexibility in consolidating matters in related files. This addition to rule 343—4.9(17A) allows parties to make motions to consolidate either orally at the time of the pretrial hearing or by written motion.

Item 2 amends Chapter 4 by adding a procedure for binding arbitration. The addition of binding arbitration enhances the procedures already in place for resolution of contested cases and offers claimants, employers, and insurance carriers another avenue for dispute resolution. Additionally, a summary trial procedure which will allow for the speedy adjudication of limited types of claims is incorporated in these amendments. These provisions are in response to the Legislature's instructions regarding the development of rules on an expedited contested case proceeding.

Item 3 provides for the creation of a new chapter for the purpose of providing an informal procedure for dispute resolution to use before a contested case proceeding is filed with the Industrial Commissioner. This procedure is also in response to the Legislature's instructions regarding development of rules on an informal process to avoid filing contested cases.

The Division of Industrial Services has determined that these proposed amendments will not have an impact on small business within the meaning of Iowa Code section 17A.31.

Persons wishing to convey their views orally will have the opportunity for oral presentation at 10 a.m. on Wednesday, January 16, 1991, in the Stanley Room of the Department of Employment Services, 1000 East Grand Avenue, Des Moines, Iowa. Written statements may be submitted prior to that date and should be directed to the Industrial Commissioner, Division of Industrial Services, 1000 East Grand Avenue, Des Moines, Iowa 50319.

These rules are intended to implement Iowa Code section 86.8 and 1990 Iowa Acts, chapter 1261, section 3.

ITEM 1. Amend 343—4.9(17A) by adding the following as the third paragraph:

Either party may file a motion to consolidate common questions of fact and law surrounding an injury or a series of injuries. The motion shall be deemed approved if no resistance to the motion is filed with the industrial commissioner within ten days of the filing of the motion. No order granting the motion will be filed by the industrial commissioner. As an alternative, the parties may make an oral motion to consolidate common questions of fact or law at the time of the pretrial hearing. A ruling on the motion will be included with the order issued from the pretrial hearing.

ITEM 2. Amend 343—Chapter 4 by adding the following new rules:

343—4.41(17A,86) Binding arbitration. After a contested case has been filed, the parties may enter into binding arbitration on any or all issues arising in a case subject to the industrial commissioner's jurisdiction. The following rules will apply:

4.41(1) Notice to the industrial commissioner. Both parties must file a written consent to disposition of their case or a particular issue by binding arbitration.

4.41(2) Selection of the presiding deputy industrial commissioner. The deputy industrial commissioner will be selected within 20 days after the parties consent to proceed under this rule. Each party will be given the

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INDUSTRIAL SERVICES DIVISION[343]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or an association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code §17A.4(1)"b".

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group review this proposed action under §17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 86.8, he Division of Industrial Services hereby gives Notice f Intended Action to amend Chapter 4, "Contested ases," and to adopt a new Chapter 10, "Informal Dispute esolution Procedures," Iowa Administrative Code.

opportunity to strike one deputy industrial commissioner from a pool of deputy industrial commissioners. The pool shall consist of a number of deputy industrial commissioners as determined by the industrial commissioner.

4.41(3) Date of arbitration. After the industrial commissioner has been notified of the parties' election to submit to binding arbitration, the industrial commissioner shall send a notice to counsel setting forth the date and time of the arbitration. The notice shall also advise counsel that they must file a stipulated scheduling order as prescribed by the industrial commissioner. Additionally, the notice shall advise the parties that they have 120 days to complete discovery unless the deputy industrial commissioner assigned to hear the case orders a shorter or longer period of discovery.

4.41(4) Evidence. The submission of evidence, if any, shall comply with subrule 343—10.2(5). The parties shall limit their written evidence to 50 pages per party for binding arbitration.

4.41(5) Record of the proceeding. No record of the arbitration shall be made.

4.41(6) Disposition. Upon the entry of the deputy industrial commissioner's decision, an order approving a Settlement by Acquiescence shall be entered by the industrial commissioner. If the deputy industrial commissioner's decision does not resolve all issues in a contested case proceeding, the decision will be the law of the case for the particular issues that are the subject of binding arbitration.

4.41(7) Waiver of appeal rights. By electing this procedure, the parties agree to waive all of their rights of intra-agency and judicial appeal with regard to the issues subject to arbitration as provided in Iowa Code chapter 17A. Additionally, the parties agree to waive their right to a review-reopening to the issues subject to arbitration unless there has been a substantial change in condition as provided by Iowa Code sections 85.26(2) and 86.14.

343—4.42(17A,85,86) Summary trial. After a contested case has been filed either party may file a motion to conduct a summary trial at any time before the case has been set for a full trial of the case in chief. The following rules will apply.

4.42(1) Contents of the motion. A motion for a summary trial must set forth specific grounds upon which the movant seeks relief under this rule, the rule which qualifies the movant's dispute for summary trial treatment and the number of weeks of benefits the movant is seeking, if any. Unless the motion is resisted within ten days of filing, the motion will be granted and the matter will be placed on the summary trial docket. The only grounds for resistance to the motion for summary trial shall be that the dispute is ineligible for summary trial disposition because the matter has been deemed ineligible for summary trial disposition as described in subrule 4.42(2) or is not included within subrule 4.42(3). The resistance must be accompanied by an affidavit supporting the resistance.

4.42(2) Cases not eligible for summary trial disposition. Notwithstanding the provisions of 4.42(3)"h," the following cases will not be eligible for disposition by summary trial:

a. Where the movant is seeking a weekly benefit amount in excess of 26 weeks.

b. In the interest of judicial efficiency and fairness, the industrial commissioner may on the industrial commissioner's own motion or on the motion of any party to a summary trial proceeding, remove any case from the summary trial docket and place it on the regular case docket.

4.42(3) Cases eligible for summary trial disposition. A party may elect this procedure for the following disputes:

a. A claim pursuant to Iowa Code section 85.27 (medical expenses and alternate care) where the employer is not, at the time of the filing of the motion, paying for services, supplies, expenses and devices. An award under this provision will be limited to the cost of services, supplies, expenses and devices incurred after the motion for a summary trial is filed to the date of the approval of a settlement, dismissal, a decision by the deputy industrial commissioner on the full contested case proceeding or until 30 days after the hearing on the full contested case proceeding, whichever shall occur first.

b. A claim pursuant to Iowa Code section 85.33 (payment of temporary total disability).

c. A claim pursuant to Iowa Code section 85.34 (payment of healing period benefits).

d. A claim pursuant to Iowa Code section 85.39 (medical examinations).

e. An application pursuant to Iowa Code section 85.70 (vocational rehabilitation benefits).

f. An application pursuant to Iowa Code section 85.36 (rate of weekly benefits owed).

g. With the consent of the industrial commissioner, any issue within the subject matter jurisdiction of the industrial commissioner.

4.42(4) Response to motion. All appearances, pleadings, and motions shall conform with rule 343—4.9(17A). For example a response to the motion for a summary trial shall be filed within ten days of the date the motion is filed. If the motion for summary trial accompanies an original notice and petition, the response to the motion will be due in ten days from the filing date of the petition. The answer to the petition will be due in 20 days.

4.42(5) Discovery. The Iowa Rules of Civil Procedure will apply to a summary trial proceeding except in the following respects:

a. Where those rules are inconsistent with the rules of the industrial commissioner.

b. The movant shall serve the respondent with all written discovery (requests for admissions, interrogatories, requests for production and the like) with the motion requesting a summary trial. Copies of any written discovery or responses to discovery requests shall not be filed with the industrial commissioner.

c. The respondent shall serve the movant with all written discovery (requests for admissions, interrogatories, requests for production and the like) within 20 days after the motion for a summary trial is filed with the industrial commissioner. Copies of any written discovery shall not be served on the industrial commissioner.

d. All rulings on discovery disputes will be made at the time of trial. Any material that was not previously produced must be available for production at the time of trial. Additionally, the parties must be prepared to answer any interrogatory that had previously been objected to or had not been fully answered.

e. The discovery deadlines for a summary trial proceeding are critical, and thus will be strictly enforced. If a party misses the deadlines, the industrial commissioner may impose sanctions pursuant to rule 343—4.36(86).

4.42(6) Trial date. Once the motion for a summary trial is granted, the industrial commissioner shall assign the matter for hearing approximately 120 days from the date the summary trial motion is granted. No continuances shall be granted unless there is an emergency or illness. If a continuance is granted, the parties must be prepared to try the case at the next earliest available date fixed by the industrial commissioner.

a. The parties may agree to waive the 120-day hearing requirement. However, a summary trial must be tried within 240 days of the filing of the motion for a summary trial. If the parties fail to try the matter within the prescribed time limit the matter shall revert to the regular contested case proceeding docket.

b. A matter that reverts to the regular contested case docket will not be eligible for summary trial disposition thereafter.

4.42(7) Length. A maximum of two and one-half hours will be allowed for hearing evidence and arguments at trial.

4.42(8) Trial. The summary trial will be informal. The time at trial may be used in any manner the parties choose. Evidence may be presented in narrative form, question and answer form (including cross-examination of an adverse party or representatives of an adverse party) and argument on the facts and law allocated as the parties choose. The presiding deputy industrial commissioner may question witnesses, discuss issues with the parties and their representatives and do all things necessary to bring the trial to an expeditious and efficient close. Unless the parties otherwise agree, the time at trial shall be allocated as follows:

a. One hour for claimant.

b. One hour for defendants.

c. Thirty minutes for questioning by the deputy industrial commissioner, rebuttal testimony and closing arguments for each party.

d. If there are multiple parties or for good cause shown, the time for presentation may be increased.

4.42(9) Pretrial procedure. Fifteen days before the date set for trial, the parties must file their own or a joint final pretrial report. The report shall contain the following information:

a. A statement of the facts.

b. A statement of the issues.

c. A list of exhibits a party expects to offer.

d. A list of witnesses a party expects to call.

4.42(10) Evidence and witnesses at trial. The presiding deputy industrial commissioner has broad discretion to receive any evidence offered by either party if its receipt will not be unfairly prejudicial to the opposing party and the opposing party had either actual or constructive knowledge of its existence. The deputy industrial commissioner's authority to receive evidence specifically includes and is not limited to evidence given by a witness not identified in the pretrial report or other evidence that was not timely identified and exchanged by the offering party.

4.42(11) Record of the proceeding. The trial will be electronically recorded and the tapes shall constitute the official record of the proceeding. Upon request of the parties and payment of a fee, the parties may obtain copies of the tape recording.

4.42(12) Evidence. The submission of evidence shall comply with subrule 10.2(5). The parties shall limit their written evidence to 25 pages per party for a summary trial.

4.42(13) Disposition. At the close of all evidence the deputy industrial commissioner may either announce the decision for the case or enter a written decision and order within 30 days from the date of the trial. In the event the decision is announced at the close of all evidence, from the bench, the deputy industrial commissioner will dictate proposed findings of fact and conclusions of law into the record. A proposed order will be entered in accordance with the decision.

4.42(14) Settlement by acquiescence. If the parties adopt the proposed findings and conclusions of the presiding deputy industrial commissioner, a Settlement by Acquiescence will be filed along with an order approving the settlement.

4.42(15) No settlement. If any party rejects the findings and conclusions of the presiding deputy industrial commissioner, the rejecting party must file, within 20 days of the filing of the ruling from presiding deputy industrial commissioner, a notice of no settlement. Upon receipt of this notice, the contested case proceeding will revert to the regular contested case docket and will be adjudicated in the normal course of agency proceedings. The decision of the presiding deputy industrial commissioner from the summary trial will be persuasive authority for the remainder of the case.

These rules are intended to implement Iowa Code sections 86.8 and 1990 Iowa Acts, chapter 1261, section 3.

ITEM 3. The following new chapter is proposed:

CHAPTER 10

INFORMAL DISPUTE RESOLUTION PROCEDURES

343—10.1(17A,85,86) Informal dispute resolution procedures. The industrial commissioner or the industrial commissioner's designee (hereinafter collectively referred to as the industrial commissioner) shall be available to resolve disputes relating to the Iowa workers' compensation law (Iowa Code chapters 85, 85A, 85B, 86, and 87) prior to the initiation of a contested case proceeding. Persons are encouraged to utilize the informal procedure provided herein so that a settlement may be reached between the parties without the necessity of a contested case proceeding. Informal procedures may be initiated as requested by any party either before or after a first report of injury has been filed. After a first report of injury is filed with the industrial commissioner, a letter is provided to the injured employee. That letter includes an explanation of the function of the office of the industrial commissioner, an explanation of informal dispute resolution procedures and the information contained on the first report of injury which indicates, among other things, the date of injury and the weekly rate of compensation. Additionally, even where a first report of injury is not on file, any party who elects to engage in informal dispute resolution may contact the industrial commissioner by telephone or mail for information regarding the claim. Documentation regarding the claim may be submitted to or requested by the industrial commissioner. The industrial commissioner may respond to the parties either by telephone or when appropriate, in writing regarding the information sought by the parties.

The informal procedures described in these rules are designed to be flexible enough to resolve any issue that any party believes is amenable to informal dispute

resolution or that with the consent of the industrial commissioner should be made the subject of informal dispute resolution procedures.

10.1(1) Nondisputed matters. If the parties agree that the claimant is correctly compensated and all benefits due and owing have been or will be paid, the parties need not file any other pleading or document with the industrial commissioner except that claims activity reports must be filed in accordance with rule 343—3.1(17A).

10.1(2) Disputed matters. In the event the parties dispute whether the claimant is entitled to compensation or whether the claimant has received all benefits to which the claimant was entitled, then the parties to the dispute may elect to engage in the informal dispute resolution procedures described herein.

10.1(3) Notification of election, statute of limitations. Within the time a claimant may file an original proceeding with the industrial commissioner, either party to a disputed claim may notify the industrial commissioner of the desire to engage in an informal proceeding to resolve the dispute. If the dispute cannot be resolved informally, claimant will have the right to file an original notice and petition to commence a contested case proceeding as provided by 343—Chapter 4. An election to engage in informal dispute resolution procedures will not toll the statute of limitations for filing an original notice and petition.

10.1(4) Good faith effort to resolve disputes. Before the parties will be allowed to elect any alternative dispute resolution procedures including those identified in rules 343—4.40(73GA,SF2328), 4.41(17A,86) and 4.42(17A,85,86) on or after the effective date of these rules, they must make a good faith effort to resolve their dispute. A professional statement signed by all parties and their representatives or an affidavit by an unrepresented party filed with the industrial commissioner attesting to the good faith attempts to settle the dispute prior to utilizing the procedures described in these rules will be deemed sufficient to meet the requirements of these rules. Notwithstanding the foregoing, a claimant who files a contested case proceeding in order to toll the statute of limitations included in Iowa Code chapter 85 may elect alternative dispute resolution procedures, including the informal procedures described in this chapter even though claimant or claimant's representative did not engage in settlement negotiations prior to the time the contested case proceeding was filed.

This rule is intended to implement Iowa Code section 86.8 and 1990 Iowa Acts, chapter 1261, section 3.

343—10.2(17A,85,86) Advisory opinion. Before a contested case is commenced, either party may elect, in writing, to have the industrial commissioner issue an advisory opinion regarding the parties' dispute. The following rules will apply.

10.2(1) Submission to the commissioner. Either party shall notify the industrial commissioner in writing of the request for an advisory opinion. Within 20 days of filing the request for an advisory opinion, the parties shall submit a written evaluation of their case, identifying all strengths and weakness in the case. The evaluation must state: (a) whether the claimant is receiving medical benefits; and (b) whether the claimant is receiving weekly benefits. Additional information necessary to evaluate the validity of the claim may be requested by the industrial commissioner.

10.2(2) Conference date. Once the parties have filed their submissions, either an in-person conference or a telephonic conference will be conducted by the industrial commissioner.

10.2(3) Length of proceeding. A maximum of one and one-half hours allocated evenly among the parties will be allowed for the conference on the claim.

10.2(4) Order of proceeding. The time at the conference will be limited to presentations by the parties or their attorneys. The parties may present summaries of their evidence or they may present evidence in conformance with subrule 10.2(5). The page limit for the evidence submitted shall be ten pages per party. This submission shall be in addition to the summaries filed in conformance with 10.2(1) and shall not be included in the calculation for the page total. The parties must stipulate prior to the conference as to how the time at the conference will be allocated.

10.2(5) Evidence. All evidence which is to be considered shall be submitted to the industrial commissioner ten days prior to the time set for the conference or the hearing. The exhibits shall be marked and placed in chronological order. Any party that fails to timely file exhibits shall waive the right to submit exhibits for consideration by the industrial commissioner. The parties will be permitted to highlight specific parts of their written evidence as they choose. In the alternative, but not by way of limitation, the parties may file summaries of any evidence they would otherwise present in support of their case.

a. The written documents must be legible and understandable. Medical records or other documents that are handwritten in shorthand or where word abbreviations appear must be accompanied by a typewritten translation of the particular document. Illegible photocopies or unreadable records will be accorded no weight, but will count toward the page limit.

b. If the parties offer joint exhibits, the total number of pages each individual party can submit will not be increased. The total number of pages submitted will not exceed the total number of parties multiplied by the page limit for the particular proceeding (e.g., 3 parties times 10 pages = 30 pages). If fewer than the maximum number of pages are offered by the parties, then the parties will divide the remaining pages equally among themselves or as the parties otherwise agree.

c. A single sided sheet of paper is one page. Depositions regardless of the number of pages included therein shall be considered as one page in calculating the page limit. Exhibits attached to depositions shall be treated as separate pages for purpose of the page limitation circulation.

d. A party may offer additional exhibits only on a showing of good cause.

10.2(6) Record of the proceedings. The conference will not be recorded unless the parties choose to make a record and arrange for a court reporter. Additionally, any material submitted to the industrial commissioner with this procedure shall not be admitted in evidence or used in any trial or hearing before the industrial commissioner.

10.2(7) Disposition. After the conclusion of the conference the industrial commissioner will announce an oral disposition for the case or enter a report and recommendation within three business days of the conference. The oral disposition will also be incorporated

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in a report and recommendation which will be sent to the parties.

a. No objection and waiver. If no objection to the report is filed, the industrial commissioner will deem that the parties have entered into a Settlement by Acquiescence. An order approving the settlement will be entered and the file will be closed.

b. No settlement. If any party rejects the report and recommendations of the industrial commissioner, the rejecting party must file, within 20 days of the filing of the industrial commissioner's report, a notice of no settlement. Upon receipt of this notice, the file will be closed unless the claimant commences a contested case proceeding in conformance with 343—Chapter 4 and Iowa Code chapter 17A.

10.2(8) Thirty-day requirement. In the event the industrial commissioner cannot schedule an advisory opinion conference within 30 days of the request for a conference, the file will be deemed closed unless the parties agree to waive the 30-day conference requirement. The parties' willingness to participate in this proceeding will be deemed a good faith effort to resolve a dispute prior to filing a contested case proceeding for purposes of 10.1(4), even if the advisory opinion conference cannot be scheduled within the 30-day time limit and the parties choose not to waive their right to a conference within that time limit.

This rule is intended to implement Iowa Code section 86.8 and 1990 Iowa Acts, chapter 1261, section 3.

ANNUAL APPELLATE DECISIONS REVIEW

October 1990 - September 1991
459 N.W.2d 619 through 473 N.W.2d 611

By

Gregory M. Lederer
Simmons, Perrine, Albright & Ellwood
115 Third Street S.E., Suite 1200
Cedar Rapids, Iowa 52401

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APPELLATE PROCEDURE

Mueller v. St. Amsgar State Bank, 465 N.W.2d 659 (Iowa 1991)

Amendment

Jury awarded the Muellers $4,500.00. Bank appealed and argued in their initial brief that there was insufficient evidence to support the verdict. Approximately one month later, Bank filed an amendment to its brief, in which it argued that the district court erred in admitting hearsay testimony.

HELD: Appellate rules require that amendments be served within 15 days after serving the initial brief. Untimely brief will not be considered.

Weigel v. Weigel, 467 N.W.2d 277 (Iowa 1991)

Costs

In unsuccessful fraud case that resulted in partially successful motion for rule 80 sanctions that was reversed on appeal, Court ordered appellant (who lost her appeal on her fraud case but obtained a reversal of the sanctions imposed against her) to pay the entire cost of the appendix, "which we find to be over-inclusive."

Ezzone v. Hansen, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Costs

Court assessed costs of 734 of the successful appellant's 1412-page appendix against the appellant, because including those pages was unnecessary to the issues raised on appeal.

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American State Bank v. Enabnit, 471 N.W.2d 829 (Iowa 1991)

Escrow Agent

American State Bank (American) loaned money to Henry and Betty Kraayenbrinks in exchange for promissory note secured by second mortgage on real estate owned by Kraayenbrinks. Kraayenbrinks sold real estate to Emersons on contract.

When Emersons defaulted, Kraayenbrinks retained Enabnit to sue Emersons. Kraayenbrinks defaulted on their note to

American, and American sued Kraayenbrinks and Emersons to foreclose on the mortgage. American and Kraayenbrinks settled by stipulating that Kraayenbrinks would pay American any amounts received from Emersons. Kraayenbrinks' action against Emersons resulted in a judgment for $55,974.18.

Emersons satisfied the judgment with three payments over several months. Local clerk-of-court practice caused the checks to be turned over to Enabnit, who deposited them in his trust account. Upon the deposit of each of the first two checks, Enabnit wrote a check on his trust account to American. With respect to the third and largest check, however, and at the express direction of Kraayenbrinks, Enabnit paid those proceeds from his trust account into a money-market account at Pioneer Savings and Loan Association (Pioneer) in the name of Henry Kraayenbrink and Betty Kraayenbrink, as tenants in common. Kraayenbrinks were involved in a dissolution of marriage. Each was represented by counsel other than Enabnit.

Subsequently, Henry Kraayenbrink instructed Pioneer to transfer all account funds to him. Pioneer issued a check payable to Henry and Betty Kraayenbrink. Henry forged his wife's name and converted the funds to his own use.

American's president met with Henry Kraayenbrink without Enabnit's knowledge, and they negotiated and executed a "release statement." Henry did not advise American's president that his release of the funds in the escrow account was of no benefit to American, since Henry already had closed that account and had converted the funds to his own use and to the injury of Betty Kraayenbrink and American.

American sued Enabnit on theories of negligence and breach of contract. American disavowed any claim for legal malpractice, but instead alleged that Enabnit assumed a duty to American by accepting funds into his trust account and, on the first two of three transactions, performing in accordance with Kraayenbrinks' contractual obligations to American. American relied upon Restatement (Second) of Torts Section 323, which has been applied or cited with approval by the Supreme Court on several occasions:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

HELD: Even assuming that American's injury constitutes "physical harm," section 323 does not apply to Enabnit "for the same reason legal malpractice does not apply: there was no undertaking of the services for [American] by Enabnit." At all times, American's and Kraayenbrinks' interests were adverse. Enabnit always dealt with American's counsel. The settlement between Kraayenbrinks and American required Kraayenbrinks, not their attorney, to pay American. The Emerson payments came into Enabnit's hands for reasons other than any direction by American. Whatever course of conduct Enabnit's treatment of the first two Emerson payments established is due to Enabnit's conduct only. Enabnit's deduction from the second payment pursuant to his attorney's lien establishes that Enabnit did not act merely as an escrow agent but instead treated the proceeds in his trust account as property owned by Kraayenbrinks.

Enabnit is not liable to American.

COMMENT: Notwithstanding American's failure to come close to establishing a legal or contractual duty owed by Enabnit to American, the court spends almost a full page apologizing for Enabnit's conduct:

> Because of our enormous pride in the profession we feel considerable discomfort when a misunderstanding arises over the handling of funds by an attorney. [American] places much reliance on the fact that the funds here were placed in Enabnit's firm trust account, and we readily agree that public confidence is especially sensitive to a lawyer's trust account.
>
> We regret that the Bank believes it has been misled by an attorney upon whom it felt entitled to rely. . . .
>
> By our holding we do not put our stamp of approval on Enabnit's conduct. The record shows he was badly mislead by . . . Henry . . . . He may have sincerely believed [American] would be sufficiently protected through the requirement of Betty Kraayenbrink's signature . . . . Even so, we like to think Enabnit would extend every effort to superintend the professional relationship in such a way as to protect the interests of his clients without damaging those of others who, even without justification, might rely on him.

Ahls v. Sherwood, 473 N.W.2d at _____ (Iowa 1991)

Finality

Ahls sued Vacationland and Optimus, the seller and a component manufacturer, respectively, of a heater that exploded in the Ahls home. District court dismissed Optimus on personal jurisdiction grounds. Vacationland then cross-petitioned against Optimus for contribution and indemnity. District court dismissed Vacationland's cross-petition on the ground that the previous dismissal was the law of the case. The Supreme Court rejected Vacationland's request to appeal in advance of final judgment.

On the day set for trial, October 3, 1989, Ahls settled with all remaining defendants. District court entered an order noting the settlements and assessing a $500.00 late settlement penalty. The dismissal documents were filed on November 15. On November 27, Vacationland filed a notice of appeal from district court's dismissal of its cross-petition against Optimus. Optimus moved to dismiss the appeal.

HELD: Vacationland's appeal was timely. District court's October 3 order did not constitute a final adjudication. Although the dismissals filed on November 15 do not constitute a "final order" by the court, the federal concept of "pragmatic finality" permits such dismissals to terminate the district court proceedings and trigger the running of Vacationland's appeal time.

Bokhoven v. Klinker, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Further Review

Defendant cross-appealed from judgment entered on defense verdict because district court apportioned 49% of court costs to her. Court of appeals affirmed on both appeals. Plaintiff then applied for further review, but defendant did not. Nevertheless, court proceeded to adjudicate defendant's cross-appeal and reversed the imposition of costs. HELD: Once Supreme Court grants further review, it "may consider all of the issues properly preserved and raised in the original briefs," including issues raised on a cross-appeal and notwithstanding cross-appellant's failure to apply for further review.

Springer v. Weeks & Leo Co., _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Law of the Case

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, defendant argued unsuccessfully that the Court's reversing language in Springer I - "We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state" - required plaintiff on retrial to establish the elements of tortious interference with contract in accordance with sections 766 and 766A of the Restatement (Second) of Torts. District court instead instructed in accordance with ICJI 3100.1 (retaliatory discharge). Jury awarded plaintiff $14,000 in lost wages and $5,000 for emotional distress. On appeal, defendant argued that the "tortious interference" language from Springer I constituted the law of the case.

The Supreme Court affirmed, disavowed all references in Springer I to the "interference" cause of action, and approved ICJI Instruction 3100.1. The court answered the "law-of-the-case" argument by holding that "an appellate court decision becomes the law of the case and is controlling . . . [unless it] has been clarified by judicial decisions following remand." Court listed all of the post-Springer I opinions in which it has referred to Springer's cause of action as "retaliatory or wrongful discharge."

In re Estate of DeVoss, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Scope of Review

Appellate review of a denial of intervention "is on error, with some deference given to the district court's discretion."

Q

Board of Water Works Trustees v. City of Des Moines, 469 N.W.2d 700 (Iowa 1991)

Time for Filing

Plaintiff sued city for damages paid by plaintiff to city residents for water damage incurred when a water line broke. Jury returned verdict for plaintiff. City timely filed a motion for judgment n.o.v., and plaintiff timely filed a motion for sanctions.

District court granted city's motion for judgment n.o.v. on August 15. District court denied plaintiff's motion for sanctions on November 20. Plaintiff filed a notice of appeal, purporting to cover all issues involved in the main case as well as its motion for sanctions, on November 30.

I.R. App. P. 5(b) provides:

> [A]n order . . . finally disposing of fewer than all the issues in the suit, even if the issues are severable, may be appealed within the time for an appeal from the order, judgment, or decree finally disposing of the action as to the remaining . . . issues.

HELD: The order finally disposing of plaintiff's lawsuit was the district court's ruling on defendant's motion for judgment n.o.v. The ruling on plaintiff's motion for sanctions "came after the order finally disposing of plaintiff's suit and did not extend the time for plaintiff to appeal the decision disposing of its suit because it did not decide any issue in the main suit. The issue of sanctions was a separate, collateral and independent issue to plaintiff's lawsuit." Plaintiff needed to file a notice of appeal from the entry of judgment n.o.v. within 30 days of that ruling.

ATTORNEYS

Nachazel v. Mira Company Manufacturing, 466 N.W.2d 248 (Iowa 1991)

Conflict of Interest

Q

Attorney Swanger did legal work for Miracle, the parent corporation of Mira. His services involved labor and employment relations. He discontinued his work with Miracle when he joined the law firm that already had been counsel of record for Nachazel in its action against Mira and Miracle for four years. At Miracle's request, Swanger then spent two hours on the telephone with Miracle personnel, reviewing an agreement he had negotiated for Miracle several years earlier. The subject matter of this action was never mentioned during that conversation. Defendant then sought to disqualify Nachazel's counsel for conflict of interest.

HELD: Swanger did not receive prejudicial information through his earlier representation of Miracle, or from the conversation he had after his transfer, and the subject matter was completely unrelated to the lawsuit. The substantial-relationship test was not met.

Committee v. Bauerle, 460 N.W.2d 452 (Iowa 1990)

Discipline

Attorney assisted client in evading taxes by back-dating several documents, including partnership agreement. Acting as notary, attorney also falsely certified that two partners subscribed and swore to a certain partnership document in the attorney's presence. Grievance commission recommended a 30-day suspension. The Supreme Court held that each act, falsifying documents and false notarization, constituted professional misconduct and suspended the attorney's license for 6 months.

> It is suggested in defense of the [false notarization] incident that the practice of notarizing signatures of absent persons is neither uncommon nor unnecessarily deceitful. We think such a practice can never be excused. It is manifestly unprofessional for a lawyer, acting as a notary public, to certify that persons who did not do so personally appeared and attested to a document.

Committee v. Hearity, 460 N.W.2d 448 (Iowa 1990)

Discipline

Attorney took defaults after assuring opposing parties that he would not, took defaults in contravention of a statute, and assisted his clients in the breach of a settlement agreement. The Supreme Court held that these activities constituted professional misconduct and reprimanded the attorney.

Q

Committee v. Wunschel, 461 N.W.2d 840 (Iowa 1990)

Discipline

Wunschel was involved in a lease/sale of a Clinton motel owned by his wife to tenants/purchasers, Ron and Zelda Noyes. The Noyes were not represented by counsel during the transactions. Wunschel drew up the contracts and the Noyes took possession of the motel in November of 1980. In August of 1987 Zelda Noyes filed an ethics complaint against Wunschel. The Committee charged Wunschel with violating EC 1 through 5, DR 1-102(A)(1), (4), and (6), and nearly all of Canon 5 of the Iowa Code of Professional Responsibility for Lawyers. The Committee additionally alleged violations of EC 7-18, DR7-104, and EC 9-6.

HELD: The facts failed to support the Committee's assertion that an attorney/client relationship had been established. However, the court found substantial evidence in the record that supported the Commission's conclusion that Wunschel misled the Noyes "into passive trust to secure an unfair gain for himself." Public reprimand.

Iowa State Bar Association v. Hall, 463 N.W.2d 30 (Iowa 1990)

Discipline

Hall obtained bank loans for a total of $350,000.00 by stating that the loans would be used for the purchase of hens and poultry equipment. He also granted the lender a purchase money security interest in the equipment. The hens and equipment were never purchased; the money was used for other purposes. Hall never repaid the bank. In a subsequent deposition, he falsely stated that the loans were unsecured.

Hall entered into several joint business ventures with a client, creating joint liability of over $900,00.00. The client considered Hall his attorney during these ventures, but Hall did not advise his client that he should seek individual counsel or tell him that their joint business relationship may have affected his professional judgment. Due to Hall's financial problems, his client was forced to pay most of the money owing. Hall's law firm also paid part of the liability.

Defendant made false representations to the Committee. He did not feel that his actions were wrong. The Commission recommended a four-month suspension. The Supreme Court revoked.

Committee v. Hill 463 N.W.2d 1 (Iowa 1990)

Discipline

Attorney allowed an appeal to be dismissed by default, offering no explanation for his neglect of the case except that he felt the appeal would be unsuccessful.

HELD: A public remand was appropriate, since his 3-month suspension was not lifted for an additional 4 months while the investigation of this complaint was conducted.

Committee v. Zimmerman, 465 N.W.2d 288 (Iowa 1991)

Discipline

Zimmerman provided legal services to a conservatorship in which his wife served as conservator. Zimmerman applied for excessive and duplicative fees for work done on the conservatorship. Zimmerman prepared and submitted an application for his wife's fees that bore no relationship to the services she rendered. He simultaneously submitted an application for his own fees that showed duplicative expense to the conservatorship. HELD: Six-month suspension.

Committee v. McCullough, 465 N.W.2d 878 (Iowa 1991)

Discipline

Attorney McCullough represented Fred Williams in a dissolution proceeding that was pending at the time of the events in question. He also had done work for Don Bierstedt. Bierstedt and Williams held interest in a farm. They also held stock in Lytton Farm Equipment and Fonda Implement. Williams borrowed money from Sac City Bank, pledging his interest in the corporations as security. Williams also borrowed $100,000 from Lytton Farm Equipment. Bierstedt wanted security. During a meeting between McCullough, Bierstedt, and Williams, it was suggested that Williams give Bierstedt a mortgage on the farm they jointly owned. McCullough claims that he was not acting as counsel for either party during the meeting, but he did not recommend that either Bierstedt or Williams ought to retain counsel.

There was a court order in the Williams' dissolution proceeding that effectively prohibited any action being taken on the farm while the dissolution was pending. Despite the court order, McCullough executed the mortgage naming himself and Bierstedt as mortgagees. Subsequently, Williams executed a concession of judgment in favor of McCullough for $250,000, claiming that the indebtedness arose out of legal services. Both the mortgage and confession of judgment were filed of record. McCullough knew that Williams did not owe him $250,000 under the mortgage or the confession of judgment.

HELD: One-year suspension.

Committee v. Tullar, 466 N.W.2d 912 (Iowa 1991)

Discipline

Revocation of license to practice law is the appropriate remedy for misappropriation of client's funds, even when the

attorney has cooperated fully with the Committee and provided restitution of funds.

Committee v. Nadler, 467 N.W.2d 250 (Iowa 1991)

Discipline

Nadler failed to commence a personal injury action on behalf of his client within the statute of limitations. He failed to meet with or obtain a written report from a surgeon from whom his client obtained a second and favorable opinion as to extent of disability and causation. When the client inquired as to the status of the case, Nadler disclosed the running of the statute and offered him $1,900.00, "this being the amount he considered [the] claim was worth less his one-third contingent fee and less $100.00 for expenses advanced." The client sued and obtained a judgment against Nadler for $35,000.00. Nadler proceeded pro se in the legal malpractice action, was dilatory in responding to discovery, did not meet pretrial deadlines, "was late for the beginning of the trial, . . . was late in returning from several recesses, . . . and failed to return to court following [a] recess [that Nadler had requested]." Nadler conveyed real estate to his wife while the legal malpractice action was pending, and failed to respond to a motion for summary judgment in a subsequent fraudulent conveyance action by the client.

Nadler failed to respond to the ethics committee or to cooperate. Nadler previously had been reprimanded publicly and had been suspended for one year. HELD: Three-year suspension.

COMMENT: Court noted that Nadler failed to alert his client to his possible malpractice claim and failed to advise his client "to seek the advice of another attorney."

Q

Committee v. Clauss, 468 N.W.2d 213 (Iowa 1991)

Discipline

Sole practitioner who had 800 to 900 open collection files sued former college student to collect $254.86 on college loan. Suit sought the principal amount, plus reasonable attorney's fees. Instead of answering, student wrote attorney and enclosed payment of $254.86. Six months later, attorney caused default to be entered against student. He did not disclose to the court her payment in full of the amount sought. As a result of the default, with costs and attorney's fees, the attorney required the student to pay $308.48, as a condition to filing a satisfaction of judgment. She did so, but he then claimed that another $42.00 was owed. She hired counsel, who sued the attorney, and the matter was resolved quickly.

HELD: Failure to disclose defendant's payment before obtaining default judgment constituted "a misrepresentation by omission in violation of DR 1-102(A)(4)." The attorney also "knowingly advanced a claim unwarranted under existing law or concealed or knowingly failed to disclose information which he was required by law to reveal, a violation of DR 7-102(A)(2) and (3)." Demands for additional amounts not actually due "constitutes misrepresentation in violation of DR 1-102(A)(4) and (6)."

Because the attorney had just completed a six-month suspension based in part on poor office practices that had existed during a time period that also covered this incident, only a public reprimand is appropriate.

Committee v. McCullough, 468 N.W.2d 458 (Iowa 1991)

Discipline

Steuk retained McCullough to represent her as executor of the estate of her former husband. McCullough soon discovered circumstances suggesting that Steuk's husband had perpetrated fraud in connection with the dissolution proceeding and decree. Steuk and McCullough agreed that McCullough would represent Steuk in an action to set aside the dissolution decree on a contingent-fee basis. McCullough filed a petition to vacate the dissolution decree, alleging that Steuk's husband had misrepresented the extent of his assets and had abused Steuk so as to preclude her from taking an active role in the dissolution proceeding. After trial, the district court set aside the dissolution decree.

Because the estate assets were difficult to liquidate, Steuk and McCullough entered into an agreement that delayed her payment of his contingent fee of $160,000.00 and that secured payment of same by a real estate mortgage on estate property in which Steuk had acquired her spouse's statutory share.

Later, in an effort to close the estate, McCullough represented that all taxes had been paid, when the Iowa inheritance tax had not been paid. Steuk later was unable to pay the Iowa inheritance tax.

Q

Eventually, Steuk retained other counsel in her effort to avoid her contingency-fee obligation. McCullough eventually agreed to accept $20,000.00. During the negotiations with her new attorney, McCullough sought to obtain an agreement as part of the settlement "that there were no ethical violations arising out of or because of [McCullough's] representation of [Steuk]."

The committee filed a complaint that charged McCullough with violating DR 2-106(A)(C) (contingent-fee agreement in a domestic relations action and excessive fee), DR 5-101(A), 5-103(A), and 5-104(A) (accepting employment in which counsel has a

financial interest, and acquiring a proprietary interest in a subject matter of litigation), and DR 6-101(A) (neglect of a legal matter). The commission found that the action to set aside the dissolution was not a domestic relations action, but found that the contingent fee was excessive. The commission also found that by taking a real estate mortgage on Steuk's interest in estate property, McCullough had acquired a proprietary interest in litigation in violation of DR 5-103(A), and had entered into a business transaction with a client in which there were differing interests, in violation of DR 5-104(A). The commission also found that the false statements about inheritance tax constituted a violation of DR 1-102(A), and that attempting to negate possible ethical violations in the settlement negotiations violated DR 6-102(A). The commission recommended a 6-month suspension.

HELD: DR 2-106(C) prohibits the use of contingent fees in domestic relations cases. This was not a domestic relations case, and the policies fostered by EC 2-22 and DR 2-106(C) are not invoked in an action to set aside a dissolution decree for extrinsic fraud. The fee was not excessive, given counsel's task as viewed at the outset of litigation, the likelihood of success, and Steuk's inability to pay on an hourly basis. DR 2-106(B) does not require "that contingent fee agreements . . . be re-examined at the conclusion of successful litigation with respect to the factors applicable to non-contingent fees."

McCullough did not violate any EC or DR by taking a mortgage in Steuk's interest in estate property. DR 5-101(A) and DR 5-103(A) do not apply to transactions that occur after the inception of the attorney's employment.

Misrepresentations with respect to payment of taxes violated the Disciplinary Rules. Although DR 6-102(A) pertains to "exculpation of professional malpractice rather than ethical violations . . . , we believe that attempting to negate another lawyer's obligation to report ethical violations" violates DR 1-103(A).

60-day suspension.

COMMENT: In a footnote, Court expressed doubts that DR 5-103(A) prohibits a lawyer from taking a security interest in a property that is a target of the litigation, even at the inception of the attorney-client relationship, unless as a result the attorney's independent judgment has been affected.

Committee v. Wenger, 469 N.W.2d 678 (Iowa 1991)

Discipline

After court suspended Wenger's license to practice on April 18, 1990, for failure to pursue diligently a matter entrusted

to him and for failing to cooperate with grievance committee, the committee filed a second complaint, alleging that Wenger had perjured himself during the first disciplinary hearing and had fabricated evidence. Wenger again failed to respond. The commission found that Wenger had given false testimony and had fabricated evidence at the first disciplinary hearing and recommended disbarment.

HELD: Three-year suspension.

Committee v. Peterson, 471 N.W.2d 787 (Iowa 1991)

Discipline

Peterson allowed five estates to become delinquent and failed to file a required annual report in a guardianship and conservatorship proceeding. Peterson also failed to cooperate with the committee. Court suspended for three months.

Committee v. Hutcheson, 471 N.W.2d 788 (Iowa 1991)

Discipline

Hutcheson "became involved in a stormy personal relationship with a young woman." After their disputes and altercations required police intervention, an assault charge was filed against her. Hutcheson gave false testimony in her support. Hutcheson also violated court orders barring him from having contact with the woman. Court imposed one-year suspension and a showing of mental health as a condition of re-entering practice.

Committee v. Williams, 473 N.W.2d 203 (Iowa 1991)

Q

Discipline

Williams was arrested and charged with OWI. While being transported by deputy sheriff to jail, Williams offered the deputy $2,000.00 and eventually $5,000.00 to let him go. According to deputy, Williams stated he could buy off the judge and county attorney, so the deputy might as well take the money. HELD: Williams admitted making the offer but denied that he claimed the ability to buy off the judge or county attorney. Williams claimed his offer was designed to obtain only his release, not the dropping of the charge.

The commission believed Williams' version and recommended public reprimand. HELD: Six-month suspension, despite the court's agreement that Williams' version was more believable.

Garcia v. Wibholm, 461 N.W.2d 166 (Iowa 1990)

Guardian Ad Litem

Guardian ad litem was appointed pursuant to rule 13 to represent incarcerated defendant in tort case. After filing an answer and asserting an affirmative defense, the guardian ad litem withdrew with court approval. The case went to trial, without the defendant being present, either in person or by counsel. Judgment was entered for substantial compensatory and punitive damages. Defendant appealed.

HELD: Judgment entered against an incarcerated person without appointment of a guardian ad litem is voidable under rule 13, even if the person was actually represented by an attorney or a court-appointed guardian. Here the incarcerated person received no representation at all. A guardian ad litem must provide a defense that will ensure protection of the ward's interest. In some circumstances, conducting an investigation and filing a general denial to avoid a default may be enough. In other circumstances, the guardian ad litem may need to do more, even to the extent of proceeding to trial.

In Interest Of J.V., 464 N.W.2d 887 (Iowa App. 1990)

Guardian Ad Litem

In an appeal from the termination of parental rights, both parents argued that the guardian ad litem provided ineffective assistance of counsel to the two minor children. Although the court was unconvinced that there was ineffective assistance of counsel, it evaluated the performance of the guardian ad litem. According to the court, the guardian ad litem performed the bare minimum of adequate services. "It simply is not sufficient for a guardian ad litem to sit back, review the records and the arguments and arrive at a decision." The guardian ad litem is designed to be an advocate for the child, not the parent or the state. The guardian ad litem must follow the requirements and restrictions of professional responsibility in fulfilling this function and must especially be informed both as to the matters of law and fact.

State v. Rahmani, 472 N.W.2d 254 (Iowa 1991)

Liability for Client's Actions

Rahmani retained Tennessee attorney Smith to represent Rahmani in connection with several investment schemes. Smith

reviewed Rahmani's marketing materials and suggested changes. Part of Rahmani's brochure contained an insert stating:

> IS IT LEGAL?
> Yes! In structuring this program, we have paid close attention to Postal, FTC and Atorney Generals' [sic] Regulations. We have retained Mr. D. Jack Smith, a highly-qualified multi-level Attorney, to insure our compliance with State and Federal Regulations. With over three years in business, we are here to stay and our Attorney will insure the security of our distributors.

Smith reviewed this insert and included it in a mailing he made to all State Attorneys General on behalf of Rahmani, but he never authorized mailing of it to consumers. Without his knowledge, Rahmani did so.

Smith eventually authorized release to consumers of an insert that simply provided:

> LEGALITIES. We have retained Mr. D. Jack Smith, a highly qualified, multi-level attorney, in an effort to insure our compliance with State and Federal regulations.

Smith in fact had acted to register Rahmani's schemes in the states where such registration was required. He revised portions of the brochure at the request of several Attorneys General.

The Iowa Attorney General sued Rahmani, his corporations, and Smith for violations of the Iowa Consumer Fraud Act. The Attorney General settled with all defendants except Smith before trial. After trial, the district court found that the Attorney General had failed to establish by clear, satisfactory, and convincing evidence that Smith's conduct constituted a deceptive act or an unfair practice. State appealed.

Q

HELD: On de novo review, State has not established any actionable conduct by Smith. None of the statements that can be attributable to him and that were released with his authorization or knowledge constitute a misrepresentation.

COMMENT: Even if any such statement had been a misrepresentation, the court indicated that no liability likely would attach.

> We are not entirely convinced that when an attorney drafts language on behalf of a client, the attorney has made a "representation" for purposes of section 714.16. Generally, when a lawyer drafts language on behalf of a client, the representations are attributed to the client.

Tri City Equipment Co. v. Modern Real Estate Investments, 460 N.W.2d 464 (Iowa 1990)

Lien

Tri City Equipment Company obtained a judgment against Ron Farkas and other defendants for $17,928.30 plus interest and court costs. Farkas proceeded to give his attorney $5,000.00 to be retained for a fee contract unrelated to the Tri City matter. Tri City levied on its judgment against Farkas and garnished the funds being held by the attorney. The attorney claimed priority under section 602.10116 and, alternatively, a possessory lien under UCC article 9.

HELD: Section 602.10116 does not provide for establishment of an attorney's lien on money paid to the attorney for legal services to be rendered in the future. A retaining lien is available only to secure attorney's fees and charges which are due for services already rendered. The extent of an attorney's lien is established when the question of priority arises.

Section 554.9104(c) precludes application of article 9 provisions on possessory liens to those liens provided by other statutes.

Anderson v. Aspelmeier, Fisch, Power, Warner and Engberg, 461 N.W.2d 598 (Iowa 1990)

Partnership Agreement

Law firm partnership agreement provided that, if a partner withdrew, the firm would make monthly payments for two years for the net purchase price paid less any debts owed to previously withdrawn partners. For the next eight years the firm would make monthly payments for the value of the withdrawing partner's interest above the net purchase price. If, however, the remaining partners decided that an act was committed by the withdrawing partner that was detrimental to the partnership and affected the value of the remaining partners' interest in the partnership, then the obligation could be reduced or eliminated.

The firm refused to pay the withdrawing partner after a two-year period because the withdrawing partner (1) continued to practice in the same city, (2) took one associate and two secretaries with him, and, (3) retained substantial business from firm clients. Additionally, the firm relied upon its 1981 partnership agreement, which provided that a withdrawing partner was still obligated to pay into retirement benefits and to pay pro-rata share of the purchase price of the interest of a partner who has retired. The 1982 agreement eliminated the specific reference

to retirement benefits. Partner withdrew in 1985. The law firm argued that the spirit of the 1981 contract should still be enforced.

HELD: Financial loss to the firm resulting from a partner withdrawing, and clients willingly following the withdrawing partner, is not sufficient to justify terminating the firm's contractual obligation to the withdrawing partner. To allow termination would be to penalize the attorney for the client's response to his or her withdrawal. The 1982 agreement eliminated individual withdrawing partner's obligation to continue to contribute to retirement pension. The firm could not offset withdrawing partner's partnership share with continuing pension contributions.

Hawkeye Bank and Trust v. Baugh, 463 N.W.2d 22 (Iowa 1990)

Pro Se

Shareholder of a closely-held corporation attempted - without the benefit of a license to practice law - to represent his father and their corporation at trial. Upon discovery of this situation, district court held that shareholder was engaged in the unauthorized practice of law and did not allow him to continue. Court also denied his motion for continuance to allow the corporation to retain counsel. Plaintiff presented its case, without response from the corporation or the father, and the court entered a judgment for the full relief requested.

HELD: District court abused its discretion in denying the continuance. Shareholder had represented the corporation throughout pretrial procedures without objection.

Cutler v. Klass, Wicher & Mishne, 473 N.W.2d 178 (Iowa 1991)

Q

Suicide

Cutler, a partner in a law firm, underwent hospitalization for depression as a result of financial problems arising from his investment in a farming operation. Upon his release, he notified the firm of his desire to return to work on a part-time basis. Partnership resolved to require contact between Cutler's doctor and partnership as a condition to Cutler's return. Firm sent letter to Cutler advising him of this decision. One partner telephoned Cutler's close friend to warn about the letter. Another partner took a phone call from Cutler's wife (who had not seen the letter) and spoke harshly with her. Cutler committed suicide after reading the letter.

His estate sued firm for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. District court sustained a motion to dismiss first two counts and sustained a motion for summary judgment on the last count.

HELD: I. Firm's dispatch of letter advising Cutler of partnership's decision to condition his return upon partnership's interview of physician is not a tortious act. Firm's ethical obligations required firm to reach conclusion about Cutler's fitness to practice. II. Court has never recognized cause of action for negligent infliction of emotional distress and certainly cannot recognize it now, given the holding on count one. III. Firm's actions did not constitute outrageous conduct.

COMMENT I: Court was very critical of district court's order sustaining motions to dismiss and very critical of defendant for filing motions to dismiss:

> Both the filing and the sustaining are poor ideas.
>
> . . .
>
> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

COMMENT II: Decision rendered it unnecessary to determine whether or not the estate could recover wrongful-death damages in a breach of contract action. Court notes, however, that the majority rule denies such recovery.

In Re Marriage of Kalvig, 460 N.W.2d 189 (Iowa 1990)

80(a)

Mother applied unsuccessfully for modification of dissolution decree to grant her primary physical custody of three children. On appeal, father requested attorney fees as a form of sanction under rule 80(a) for mother's filing of a harassing and frivolous appeal. The Court of Appeals did not address whether Rule 80 is applicable to the filing of an appeal, but held that mother's appeal was not frivolous or without legal support.

Dull v. Iowa District Court for Woodbury County, 465 N.W.2d 296 (Iowa App. 1990)

80(a)

Van Iperens, plaintiffs, dismissed their legal malpractice action against the law firm one day before hearing on a summary judgment motion and 12 days before trial, ostensibly because defense counsel would not agree to the scheduling of plaintiffs' expert's evidentiary deposition. They immediately refiled an identical lawsuit. The law firm filed a motion in the original malpractice action for sanctions under rule 80(a). The law firm claimed that plaintiffs dismissed for an improper purpose.

HELD: District court found on the basis of substantial evidence that the plaintiffs' counsel believed his ability to adduce crucial evidence was in danger.

State v. Duckert, 465 N.W.2d 871 (Iowa 1991)

80(a)

State commenced a paternity action on behalf of a minor child against Ronald Duckert. Blood-testing results showed a zero possibility that the respondent was the father. State then moved for dismissal, which was granted. Duckert moved for sanctions pursuant to rule 80(a), claiming that commencement of this litigation constituted harassment and that the State violated its duty to conduct a proper investigation. The district court imposed a sanction against the State for its failure to investigate the possible paternity of another man.

HELD: The pertinent facts regarding fatherhood were solely in the mother's control. The law does not require corroboration of the mother's testimony in a paternity action. State

could reasonably rely on the information supplied by the mother in conducting its pre-filing inquiry. The district court's imposition of Rule 80(a) sanctions against the State was an abuse of discretion.

Weigel v. Weigel, 467 N.W.2d 277 (Iowa 1991)

80(a)

After Eva and Phillip Weigel's dissolution, Eva sued Phillip for fraudulently understating his assets in the dissolution proceeding. After trial, the district court found that she had failed to establish fraud and dismissed her action. Phillip's moved pursuant to rule 80(a) for entry of sanctions against Eva and her counsel. District court found that counsel had made reasonable inquiry and had a reasonable factual basis for commencing Eva's action, but imposed sanctions on Eva because it found that she prosecuted the action "for the purpose of harassing Phillip Weigel and causing him to incur costs of litigation."

HELD: No abuse of discretion in finding reasonable inquiry and reasonable factual basis for commencement of action. Given that finding, however, district court abused its discretion in sanctioning Eva. Given "that the fraud suit was justified under the law and the facts . . . , 'the subject intent of the pleader or movant to file a meritorious document is of no moment. The standard is reasonableness.'" Quoting Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). "[O]therwise, actions such as dissolutions would provide endless work for courts in sorting out the sanctions possible in such emotionally charged and often acrimonious actions."

COMMENT I: Court fails to mention the split in authority on federal rule 11 cases over whether or not a document that meets the "well-grounded" requirement can be the subject of sanctions when there is evidence of improper motive or purpose for the filing. Like rule 11, rule 80(a) requires counsel to certify two facts: that the document filed "is well grounded in fact and is warranted by existing law," and that the document "is not interposed for any improper purpose." Court's opinion seems to acknowledge that a filing can meet first test and fail the second, but court announces that such failure will not result in sanctions, at least against the party. The court spends several paragraphs explaining that rule 80(a) is intended primarily to regulate the conduct of counsel, not parties. The purpose of this dicta is not clear, unless it is to provide a basis for limiting the effect of this opinion to rule 80 motions against parties.

COMMENT II: The court again modifies its standard of review on rule 80(a) cases to adopt an abuse of discretion standard on all issues, as has been announced in Cooter & Gell v. Hartmarx Corp., 496 U.S. _____, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

"Of course, we will still correct erroneous application of the law in the exercise of that discretion." Court also notes that under federal rule 11, at least, sanctions may be applied only against the individual signing attorney. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989). Phillip had sought sanctions against Eva's law firm. It had not raised the Pavelic argument, and disposition of Phillip's motion favorably to the firm made the issue moot in any event. Rule 80(a) is identical to rule 11 on this particular point, but the United States Supreme Court was sharply divided in Pavelic.

COMMENT III: The court provides extensive treatment of the reasonable inquiry test to be applied in rule 80(a) motions against counsel. It notes that "reasonableness" of the inquiry can be affected by time available for investigation, amount of reliance on client necessary to prepare filing, and extent to which signor has depended upon forwarding counsel.

Fields v. Iowa District Court, 468 N.W.2d 38 (Iowa 1991)

80(a)

Physician who obtained summary judgment dismissing medical malpractice case against him because plaintiff failed to designate an expert filed a motion pursuant to rule 80(a) for sanctions. District court sustained motion and imposed $9,000.00 in sanctions against plaintiff's attorney for failing to investigate adequately before commencing suit.

HELD: No abuse of discretion in granting motion (attorney did not contest amount of sanction). Attorney filed suit only two months after his first consultation with client. There were six months remaining on the statute of limitations. The merits of the suit clearly were outside Field's understanding, but he did not consult any physician before filing. After filing but before the statute would have run, Fields received an opinion from a doctor that the defendant physician had not breached any standard of care. Fields did not obtain any medical records or x-rays before filing. Fields was told, again before filing, by "an experienced attorney" who had been consulted previously by the client that he had refused to file the case.

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Board of Water Works Trustees v. City of Des Moines, 469 N.W.2d 700 (Iowa 1991)

Rule 80(a)

Plaintiff sued city for damages paid by plaintiff to city residents for water damage incurred when a water line broke. Jury

returned verdict for plaintiff. City timely filed a motion for judgment n.o.v., and plaintiff timely filed a motion for sanctions. District court granted city's motion for judgment n.o.v. on August 15. District court denied plaintiff's motion for sanctions on November 20. Plaintiff filed a notice of appeal, purporting to cover all issues involved in the main case as well as its motion for sanctions, on November 30.

I.R. App. P. 5(b) provides:

> [A]n order . . . finally disposing of fewer than all the issues in the suit, even if the issues are severable, may be appealed within the time for an appeal from the order, judgment, or decree finally disposing of the action as to the remaining . . . issues.

HELD: The order finally disposing of plaintiff's lawsuit was the district court's ruling on defendant's motion for judgment n.o.v. The ruling on plaintiff's motion for sanctions "came after the order finally disposing of plaintiff's suit and did not extend the time for plaintiff to appeal the decision disposing of its suit because it did not decide any issue in the main suit. The issue of sanctions was a separate, collateral and independent issue to plaintiff's lawsuit." Plaintiff needed to file a notice of appeal from the entry of judgment n.o.v. within 30 days of that ruling.

On plaintiff's timely appeal from the order overruling plaintiff's motion for sanctions, the Court found no abuse of discretion in district court's refusal to impose sanctions.

Abel v. Bittner, 470 N.W.2d 348 (Iowa 1991)

Rule 80(a)

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Beneficiaries eliminated by codicil sued for tortious interference with inheritance expectancy. On July 25, 1989, district court sustained defendants' motion for summary judgment. Defendants moved for sanctions under rule 80(a). District court found that no violation had occurred at the time that plaintiffs and their counsel filed their original pleadings, but determined that plaintiffs' counsel "had had sufficient opportunity to discover the lack of merit in certain claims espoused" by the time it sought to amend the petition on July 13, 1989. District court sustained defendants' rule 80 motion and sanctioned counsel by "public admonishment." Both sides appealed.

HELD: No abuse of discretion in imposing sanctions on counsel for the amendment or in refusing to impose sanctions for the original filings.

COMMENT: Opinion contains minimal discussion and analysis of the merits of the motion for sanctions. Given the evolution of the court's standard of appellate review in rule 80(a) cases in the direction of deference to the exercise by district court of discretion, the lack of discussion and analysis could well be intentional.

Farmers State Bank v. United Central Bank, 463 N.W.2d 69 (Iowa 1990)

179(b)

FSB loaned money to a farmer under three notes, and UCB purchased loan participation in the notes. After the notes were due, FSB consolidated them into one. UCB refused to continue, however, as a loan participant in the renewal of the loan. JEMS, the parent corporation of FSB, then participated in the loan in order to avoid banking regulation violations by FSB.

Following a loss on the loan, FSB and JEMS sued UCB for reimbursement for the loss attributable to UCB's failure to renew its loan participation, claiming that a loan officer of UCB had promised to renew. District court entered judgment against FSB and JEMS without ruling on JEMS' claim for "money had and received."

HELD: Assuming that JEMS actually raised this theory at trial, district court's failure to adjudicate it required JEMS then to file a rule 179(b) motion. Its failure to comply with rule 179(b) prevents it from asserting this issue on appeal.

Eaton v. Meester, 464 N.W.2d 691 (Iowa App. 1990)

179(b)

Medical malpractice case was dismissed as a discovery sanction pursuant to rule 134(b)(2)(c). Plaintiff filed motion to reconsider. District court upheld dismissal and denied plaintiff's "motion to reconsider." Plaintiff filed an appeal more than 30 days after the original dismissal but within 30 days of the ruling denying his motion to reconsider. HELD: The motion to reconsider was in substance a timely rule 179(b) motion.

Midwest Recovery Service v. Cooper, 465 N.W.2d 855 (Iowa 1991)

179(b)

Rule 179(b) motion is not available to obtain review of the district court's ruling on an appeal from a judgment in small claims court.

Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991)

179(b)

Plaintiff was unsuccessful after trial to the court. He served a 179(b) motion by regular mail within 10 days of district court's ruling and mailed the original to the clerk for filing, which occurred two days later.

HELD: "Because the actual filing was done within a reasonable time after the service, rule 82(d) makes the filing date timely."

State v. Santa Rosa Sales & Marketing, Inc., _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

179(b)

Attorney General sued Santa Rosa for violations of Consumer Fraud Act and Uniform Securities Act. Court entered ruling and decree after trial, leaving neither side happy. State filed 179(b) motion (which contained a request for an extension of the 10-day deadline) 17 days after entry of the ruling. Santa Rosa filed notice of appeal within 30 days of original ruling but before court had ruled on State's 179(b) ruling. State cross-appealed within 30 days of ruling on 179(b) motion (district court granted State's request for extension of time).

HELD: Request for extension of 10-day deadline for rule 179(b) motion was untimely, and district court had no authority to grant it or to entertain 179(b) motion. Santa Rosa's appeal within 30 days of court's original ruling, therefore, was not premature; State's motion to dismiss Santa Rosa's appeal is denied. State's cross-appeal, which was not filed either within 30 days of court's original ruling or within 5 days of Santa Rosa' appeal, is untimely and is dismissed.

Sanchez v. Kilts, 459 N.W.2d 646 (Iowa App. 1990)

215.1

In a case already subject to a 215.1 notice, pro se and imprisoned plaintiff caused an attorney to appear for the limited purpose of obtaining a second 215.1 continuance. Attorney filed a motion for continuance one day before the try-or-dismiss deadline established by the previous order of continuance. District court granted the motion ex parte. Then plaintiff failed to try the case before the next deadline or to get it continued, and case was dismissed pursuant to rule 215.1. District court overruled a motion to reinstate.

HELD: 215.1 continuances may not be granted ex parte. Case was dismissed by operation of law on second try-or-dismiss deadline. the motion to reinstate, filed after the subsequent dismissal but still within six months of the second try-or-dismiss deadline, was properly overruled. Plaintiff had failed to show reasonable diligence in making the case ready for trial.

Hawkeye Bank and Trust v. Baugh, 463 N.W.2d 22 (Iowa 1990)

Continuance

Shareholder of a closely-held corporation attempted - without the benefit of a license to practice law - to represent his father and their corporation at trial. Upon discovery of this situation, district court held that shareholder was engaged in the unauthorized practice of law and did not allow him to continue. Court also denied his motion for continuance to allow the corporation to retain counsel. Plaintiff presented its case, without response from the corporation or the father, and the court entered a judgment for the full relief requested.

HELD: District court abused its discretion in denying the continuance. Shareholder had represented the corporation throughout pretrial procedures without objection.

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Weigel v. Weigel, 467 N.W.2d 277 (Iowa 1991)

Continuance

No abuse of discretion in overruling a motion for continuance based on a need to complete discovery, when facts supported district court's conclusion that movant had adequate time to conduct discovery already.

Carson Grain & Implement v. Dirks, 460 N.W.2d 483 (Iowa App. 1990)

Counterclaim

Dirks farmed two parcels of land. He orally contracted with Carson to provide weed control. Carson sprayed the two parcels, but not at the same time. Dirks claimed that failure to spray the parcels at the same time was a material breach of the contract and refused to pay Carson's bill.

Carson sued, and Dirks counterclaimed. Before trial, Dirks dismissed the counterclaim with prejudice. The district court found that Dirks had breached the contract, that Carson's charges were fair and reasonable, and that Carson was entitled to its service charge as well as statutory interest.

HELD: Dirks' dismissal of his counterclaim deprived the district court of the opportunity to rule on Dirks' argument that Carson failed to perform as it had agreed.

COMMENT: Why? Didn't Carson have the obligation to prove that it performed? Does Dirks have to assert a counterclaim to argue that Carson did not perform and therefore was not entitled to be paid?

Newton Manufacturing Co. v. Biogenetics, 461 N.W.2d 472, (Iowa App. 1990)

Default

Newton Manufacturing brought an action against Biogenetics, an Illinois Corporation, for money due on several orders of gymbags. Margaret Featherstone was personally served at the Biogenetics office. Although Featherstone was not an officer or agent of Biogenetics, she had accepted service in the past. Default judgment was entered against Biogenetics. Biogenetics moved pursuant to rule 236, claiming that there was a jurisdictional defect and that this defect fell under one of the grounds upon which a default judgment can be set aside under this rule.

HELD: The Court found no jurisdictional defect, therefore, Biogenetics' argument was moot. The trial court did not abuse its discretion in refusing to set aside the default judgment.

Home Federal Savings and Loan Association v. Robinson, 464 N.W.2d 894 (Iowa App. 1990)

Default

Defendant suffered default judgment of foreclosure. Within one year, she filed petition to vacate the decree under rule 252(e):

> Upon timely petition and notice under rule 253 the court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds:
>
> . . .
>
> (e) unavoidable casualty or misfortune preventing the party from prosecuting or defending.

Defendant claimed an illness kept her away from the courthouse and prevented her from defending her action. HELD: Defendant adduced no evidence that she would have provided a defense had she been present or that she was prevented from obtaining an attorney to file a resistance of plaintiff's motion.

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Deposition

Witness returned to state from Florida to testify for plaintiff. Defendant subpoenaed witness, but witness returned to Florida after testifying in plaintiff's case in chief. HELD: District court did not abuse its discretion in permitting defendant to introduce witness' deposition testimony, the content of which was neither irrelevant nor cumulative.

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Meyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Deposition

District court has no authority to impose the prevailing party's cost of procuring a copy of a deposition paid for by the opposing party as court costs.

Eaton v. Meester, 464 N.W.2d 691 (Iowa App. 1990)

Discovery

In a medical malpractice case, plaintiff failed to comply with district court's discovery order and there was evidence of bad faith. HELD: No abuse of discretion in dismissing as a sanction for willful failure to comply with the discovery order.

Handley v. Farm Bureau Mutual Insurance Co., 467 N.W.2d 247 (Iowa 1991)

Discovery

Handley was killed in two-car accident. Her estate sued the owner-operator of the other vehicle and Handley's insurer, Farm Bureau. The estate's claims against Farm Bureau were for under-insured motorist coverage provided by Farm Bureau under two policies issued to Mr. and Mrs. Handley, and for first-party bad faith for Farm Bureau's failure to pay the benefits. Farm Bureau moved for a stay of discovery from it, pending resolution of the estate's claim against the tortfeasor and pending a prima facie showing by the estate of bad faith.

HELD: District court did not abuse its discretion in refusing to stay discovery or to grant a protective order. No statute, rule, or case requires the estate to make any preliminary showing of bad faith as a condition to conducting discovery of the insurer. The insurer's file may assist the estate in establishing the bad-faith claim.

Shannon v. Hansen, 469 N.W.2d 412 (Iowa 1991)

Discovery

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Dram-shop plaintiff sought by subpoena duces tecum and application to district court production of written statements taken by state highway patrol officers in their investigation. State moved for entry of protective order. District court denied State's motion and ordered production of statements. State sought review by certiorari.

HELD: State failed to meet parts two and three of test provided by State v. Iowa District Court, 356 N.W.2d 523 (Iowa 1984), for maintaining confidentiality:

> (1) a public officer is being examined,

(2) the communications made to the officer were in official confidence, and

(3) the public interest would suffer by disclosure.

Section 321.271, as amended in 1967 and as interpreted in Grocers Wholesale Coop. v. Nussberger Trucking Co., 192 N.W.2d 753 (Iowa 1971), render confidential only the drivers' accident reports to DOT. "Statements made by witnesses to peace officers investigating a motor vehicle accident to enable the officers to make their reports are not made in 'official confidence' for the purpose of section 622.11." Because this was a traffic accident as opposed to a criminal matter, and because the investigation had been completed, disclosure did not harm the public interest.

Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Discovery

In dram shop case, plaintiff asked bar by interrogatory to disclose persons "who saw and conversed with" decedent on the night of his death and persons with knowledge of decedent's consumption of alcohol at the bar. At trial, defendant's bartender testified as to the presence of a person not listed in defendant's answer to interrogatory, and testified that this previously undisclosed person had asked the bartender "who Hobbiebrunken was." Plaintiff made no objection or otherwise complained of this alleged inconsistently between defendant's evidence and its answer to interrogatory until her motion for new trial.

HELD: Plaintiff's failure timely to object or request a continuance waived her right to complain about the alleged omission in defendant's answer to interrogatory. Moreover, the bartender's testimony did not establish that the "new" witness conversed with Hobbiebrunken or had any knowledge of his consumption of alcohol.

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Cutler v. Klass, Wicher & Mishne, 473 N.W.2d 178 (Iowa 1991)

Discovery

Without any discussion of the facts or issues, and in an opinion that otherwise affirms dismissal of plaintiff's tort claims, court reverses imposition of discovery sanctions imposed for plaintiff's failure to respond to interrogatories.

Lanz v. Pearson, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Discovery

Defendant in car-accident litigation refused under work-product doctrine to produce copies of or disclose content of statements he made to his insurer. At trial, district court permitted plaintiff to ask defendant if he had made any statements about the accident, but refused to permit further questioning either for impeachment purposes or as a method of refreshing recollection.

After reversing the defense verdict for other reasons, the court noted for purposes of retrial that plaintiff was not entitled to the statements absent the showing of substantial need in Rule 122(c), in accordance with Ashmead, 336 N.W.2d at 201. The court noted that plaintiff had not attempted to compel production of the statements when his written request for same was met with objection. The court also refused to permit plaintiff to use doctrine of refreshing recollection as a vehicle for causing the statements to be produced at trial.

Sorenson v. Shaklee Corp., 461 N.W.2d 324 (Iowa 1990)

Dismissal

Plaintiffs attended a hearing on defendant's motion for summary judgment, and the hearing did not go well. Plaintiffs secured permission to file additional briefs. Instead, they dismissed without prejudice and refiled in federal court. District court ruled that plaintiffs could not dismiss as a matter of right under rule 215, because Shaklee's summary judgment motion had been heard and submitted.

HELD: Rule 215 restricts a plaintiff's right to dismiss without prejudice upon the commencement of trial. Rule 176 defines trial as a "judicial examination of issues in an action, whether of law or fact." Notwithstanding the language of rule 176, a summary judgment hearing is not a trial. Proceedings on motions, as opposed to pleadings, are not trials.

Mills v. Department of Transportation, 462 N.W.2d 300 (Iowa App. 1990)

Expert

District court allowed plaintiff's expert to testify in condemnation appeal even though plaintiff failed to supplement her interrogatory answers to reflect the expert's opinion until two weeks before trial. Plaintiffs had disclosed the expert 10 months

before trial. Defense counsel corresponded several times with plaintiff's counsel in the several months before trial about deposing the expert. The last letter, sent six weeks before trial, confirmed counsel's agreement to depose the expert after his report was furnished, which was expected the next week. Plaintiff instead supplied the report just two weeks before trial. Defendant moved to exclude the testimony. District court overruled the motion.

HELD: District court did not abuse its discretion in allowing plaintiff's expert to testify, even though plaintiff violated Rule 125(c). The purpose of the rule is to avoid surprise; defendant was not surprised by the fact that the expert would be called.

COMMENT: Court would have sustained district court's decision to exclude the expert.

Security Mut. Ins. Co. v. Board of Review, 467 N.W.2d 301 (Iowa App. 1991)

Experts

Taxpayer protested property tax valuation with board of review, and then commenced appellate proceeding in district court pursuant to section 441.38. Board of review served an expert-witness interrogatory about two months before trial. Taxpayer answered this interrogatory just three days before trial and on the same day that taxpayer deposed its experts for purpose of using the depositions at trial. Board objected, but proceeded to cross-examine. Taxpayer agreed that board could reopen the depositions if it desired. At trial, district court received the experts' testimony over board's objection that the experts had not been timely offered under rule 125(c).

HELD: No abuse of discretion. Board did not claim or establish any prejudice from the violation of 125(c).

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Day v. McIlrath, 469 N.W.2d 676 (Iowa 1991)

Experts

Rule 125(a) provides:

> [D]iscovery of facts known, mental impressions, and opinions held by an expert whom the other party expects to call as a witness at trial, otherwise discoverable under [rule 122(a)] and acquired or developed in anticipation of

litigation or for trial may be obtained [in a specified manner].

Defendant in car-accident litigation submitted expert-witness interrogatory under rule 125. Plaintiff objected to the extent that the interrogatory sought discovery of plaintiff's treating physicians, because their "mental impressions and opinions were not acquired or developed in anticipation of litigation or for trial." District court compelled plaintiff to answer interrogatory with regard to treating physicians as well as other experts, but ruled that treating physicians need not sign the answer as required by the unnumbered paragraph at the end of rule 125(a).

The Supreme Court reversed in a per curiam opinion:

> A treating physician ordinarily learns facts in a case, and forms mental impressions or opinions, substantially before he or she is retained as an expert witness, and often before the parties themselves anticipate litigation. We believe a treating physician ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability) which may become paramount in the context of a lawsuit. In sum, we do not believe that a treating physician's factual knowledge, mental impressions and opinions stand on precisely the same footing, especially in the early stages of litigation, as those of the retained expert contemplated by rule 125. Therefore we believe it would be inappropriate to employ all the disclosure procedures of rule 125, including especially the requirement of the expert's signature, to the factual knowledge, mental impressions and opinions of a treating physician.
>
> . . . [A] party remains under a duty to supplement discovery . . . . When a treating physician assumes a role in litigation analogous to the role of a retained expert, supplemental discovery under rule 125(c) could become obligatory.

Cox v. Jones, 470 N.W.2d 23 (Iowa 1991)

Experts

Surgeon performed cataract removal operation on plaintiff. When her vision began to deteriorate one year later, she attempted to revisit surgeon. The office requested that she pay $50.00 or provide proof of insurance before giving her an appointment, because her outstanding bills had not been paid. Plaintiff saw another physician, Zweben, who referred her to University Hospitals for emergency surgery on a detached retina.

Plaintiff sued doctor in May 1988. The 180-day deadline from section 668.11 for certifying an expert witness expired in December 1988. Plaintiff certified no expert and requested no extension during that six-month period. In July 1989, plaintiff disclosed Zweben as a treating physician with knowledge regarding his treatment of plaintiff. Defendant deposed Zweben in July of 1989. On January 1, 1990, thirteen months late, plaintiffs certified Zweben as their expert witness.

Defendant moved to strike plaintiff's designation of expert witness for violation of section 668.11. District court sustained defendant's motion and struck Zweben's testimony on issues of medical negligence or standard of care. District court indicated that Zweben could testify only regarding his care and treatment of plaintiff.

HELD: Plaintiff failed to comply with section 668.11's 100-day deadline for certifying an expert, and failed to show good cause for obtaining an extension of the deadline. Information learned by defendant in the summer of 1989 about plaintiff's subsequently-designated expert is irrelevant because it occurred after plaintiff's deadline had expired and because the information related to care and treatment rather than the subjects of expert testimony.

Section 668.11 applies to treating physicians as well as other experts.

> A treating physician may qualify as an expert. However, until a treating physician is designated as an expert pursuant to section 668.11, the opposing party should be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care or causation. . . .
>
> In establishing a deadline by which both parties must have named their experts, the legislature obviously intended to provide an element of certainty in professional liability

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cases. As a result, speculation about the identity of experts and last minute dismissals are prevented when an expert cannot be found. Allowing a treating doctor to testify as an expert, without prior designation as an expert, defeats the legislature's purpose in enacting section 668.11.

In re Estate of DeVoss, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Intervention

District court properly denied petitions of intervention by disinherited heirs at law in declaratory judgment action brought by executor to determine validity of deeds signed by decedent. HELD: Appealing verdict that had rendered them disinherited left their interest too speculative to merit intervention. Appellate review of a denial of intervention "is on error, with some deference given to the district court's discretion."

Weigel v. Weigel, 467 N.W.2d 277 (Iowa 1991)

Requests for Admissions

District court did not abuse its discretion in permitting late responses to requests for admissions, especially when court was considering objections to requests during the 30-days.

Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991)

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Service

Plaintiff was unsuccessful after trial to the court. He served a 179(b) motion by regular mail within 10 days of district court's ruling and mailed the original to the clerk for filing, which occurred two days later. HELD: "Because the actual filing was done within a reasonable time after the service, rule 82(d) makes the filing date timely."

Tull v. Honda Research and Development, 469 N.W.2d 683 (Iowa 1991)

Venue

Plaintiff was injured while riding a Honda ATV owned by Richard Johnson on Johnson's property in Ringgold County. Plaintiff sued Johnson for negligence and four corporations in the chain of manufacture and distribution for strict liability and negligence. Plaintiff filed his suit in Polk County, where one of the corporate defendants had a registered agent. Plaintiff claimed venue in Polk County pursuant to section 616.18:

> Actions arising out of injuries to a person or damage to property may be brought in the county in which the defendant, or one of the defendants, is a resident or in the county in which the injury or damage is sustained.

Johnson moved for change of venue from Polk to Ringgold County pursuant to rule 175. District court overruled the motion. Plaintiff settled with all corporate defendants. Johnson then moved for reconsideration of the venue ruling or, in the alternative, for dismissal. Johnson relied on section 616.20:

> Where an action provided for in sections 616.17 and 616.19 is against several defendants, some of whom are residents and others non-residents of the county, and the action is dismissed as to the residents, . . . such non-residents may, upon motion, have said cause dismissed . . . .

Johnson claimed that the controlling venue provision for plaintiff's claim against Johnson and the four corporate defendants was section 616.17:

> Personal actions, except as otherwise provided, must be brought in a county in which some of the defendants actually reside, but if neither of them have a residence in the state, they may be sued in any county in which either of them may be found.

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HELD: Section 616.17, not section 616.18, controlled plaintiff's venue rights. "Personal actions," as used in section 616.17, includes those brought for damages because of a tort or breach of contract. Until 1941, section 616.17 was the general venue statute for such actions. In 1941, legislature enacted section 616.18 to provide a special venue provision for actions arising out of motor vehicle accidents. In 1972, the legislature

amended section 616.18 to delete the references to motor vehicles and to leave the statute as quoted above.

"As it now reads, [section 616.18] is an exception to section 616.17. . . . [T]he only time section 616.18 would apply is when the injury or damage is sustained in a county where none of the defendants resides." Because Johnson resides where the accident occurred, section 616.17 applies and controls plaintiff's venue rights. By dismissing the only defendants who were residents of Polk County, plaintiff triggered Johnson's right under section 616.20 to have the action against him dismissed.

COMMENT: Presumably because the parties mentioned statute of limitations problems for plaintiff in the event Johnson's appeal was successful, the Supreme Court proceeded to decide that dismissal of plaintiff's lawsuit created "no statute of limitations problem." The court "held" that a timely second lawsuit by plaintiff would be a continuance of the first one under section 614.10:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

Court could not "see how the Tulls could be negligent for not prosecuting the case. What triggered dismissal under section 616.20 was the settlement . . . . In our view, a contrary result would tend to discourage settlements."

CIVIL RIGHTS

Engstrom v. State, 461 N.W.2d 309 (Iowa 1990)

Due Process

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on theories of negligence, intentional infliction

of emotional distress, violation of due process, and breach of contract. Defendants obtained summary judgment as to all claims.

HELD: Because plaintiffs were not within the State's custody, due process does not generate any constitutional duty of care. There is no liberty or property interest in a pre-familia relationship with child.

Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991)

Pre-emption

Hospital and association of hospitals terminated their employment of administrator, allegedly because of his age. Grahek filed a complaint with the civil rights commission, but the commission dismissed it as being filed beyond the 180-day statute of limitations. Administrator then sued his employers for breach of contract, breach of implied covenant of good faith and fair dealing, wrongful termination, fraudulent and negligent misrepresentation, and intentional interference with contractual relations. District court entered summary judgment in favor of defendants, against all of Grahek's claims.

HELD: Grahek's claims for breach of contract, misrepresentation, and interference are separate and independent causes of action, and are not pre-empted by the exclusive remedies provided by chapter 601A for age discrimination. Grahek alleges that defendants breached an employment contract of a certain duration. Motivation would be irrelevant to his contract claim. The misrepresentation and interference claims focus on conduct that, if true, is actionable under those theories without regard to whether or not the motivation also violates chapter 601A.

Grahek's claim for wrongful termination is indistinguishable from his civil rights claim and was properly dismissed.

Iowa does not yet recognize a cause of action for breach of implied covenant and good faith and fair dealing. If it were valid, it would arise under these facts only by proof of conduct already violative of chapter 601A. Accordingly, chapter 601A would pre-empt such a claim.

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Vaughn v. Ag Processing, Inc., 459 N.W.2d 627 (Iowa 1990)

Religious Discrimination

Plaintiff walked off his job in the maintenance department of a soy bean processing plant after failing to obtain protection from his

supervisor's verbal abuse, most of which centered on plaintiff's Catholicism. Plaintiff had talked to the appropriate superior in accordance with the personnel handbook, and the plant manager reprimanded the supervisor. The verbal abuse with anti-Catholic statements continued and, at plaintiff's request, the plant manager again cautioned the supervisor. Ten days later and ostensibly for poor performance, the supervisor told plaintiff to leave. The plant manager thereafter repeatedly asked plaintiff to return to work, reprimanded the supervisor, caused him to apologize personally to plaintiff, and assured plaintiff that in the time after his departure, the supervisor's behavior had improved. Plaintiff refused and ultimately commenced a civil rights action against the employer. Trial to the court resulted in a judgment for back pay, emotional distress damages, punitive damages, and attorney fees.

HELD: The Iowa Civil Rights Act proscribes creation or continuation of a hostile work environment based on religious harassment, as a form of religious discrimination prohibited by section 601A.6(1)(a). Elements of a prima facie case of religious harassment are:

> (1) Plaintiff belongs to protected class,
>
> (2) plaintiff was subject to unwelcome religious harassment,
>
> (3) harassment was based on religion,
>
> (4) harassment affected a term, condition, or privilege of employment, and
>
> (5) employer knew or should have known of harassment and failed to take prompt remedial action.

On review at law, plaintiff failed to adduce substantial evidence that employer had failed to take prompt remedial action. Judgment on awards of compensatory and punitive damages and attorney fees is reversed.

CROSS-APPEAL: Plaintiff complained of the district court's dismissal of his claims for wrongful discharge, unfair employment practices, and termination in bad faith and with actual malice. HELD: Unlike Springer, where plaintiff was discharged in retaliation for pursuing workers' compensation, retaliatory discharge that implicates Chapter 601A is preempted by the remedies in 601A. The other claims likewise are preempted by the exclusive remedies provided in Chapter 601A.

Plaintiff's cross-appeal also raised the dismissal before trial of his claim for breach of employment contract. Plaintiff claimed that defendant failed to follow policies and procedures set

forth in the employee handbook. HELD: Breach of employment contract is not preempted by Chapter 601A, but is a separate and independent cause of action triable to a jury. How plaintiff and defendant perceived the contents of the handbook is an issue of fact. See Cannon, 422 N.W.2d 638 (Iowa 1988).

DISSENT: Three justices believed plaintiff had adduced substantial evidence that the employer did not respond promptly to remedy the hostile environment/religious harassment.

Bakken v. City of Council Bluffs, 470 N.W.2d 34 (Iowa 1991)

Substantive Due Process

Plaintiff's operation of a bait shop in a multi-family residential zone predated the zoning ordinance. He applied for building permits to comply, he said, with city health requirements. City declined to issue the building permits and denied a request for rezoning.

Plaintiff sued on alternative theories of just compensation for a "taking" under the fifth amendment and deprivation of substantive due process. After trial, jury returned a substantial verdict on instructions and verdict forms that do not permit identification of theory on which plaintiff was successful.

HELD: Assuming that plaintiff's "taking" claim can arise from the city's regulation of plaintiff's property, plaintiff failed to exhaust state remedies, specifically inverse condemnation. Plaintiff's substantive due process claim under section 1983 does not require finality or exhaustion of state remedies, so case must be remanded for trial on the substantive due process claim under section 1983 only.

Q

COMMERCIAL LAW

Tri City Equipment Co. v. Modern Real Estate Investments, 460 N.W.2d 464 (Iowa 1990)

Attorney's Lien

Tri City Equipment Company obtained a judgment against Ron Farkas and other defendants for $17,928.30 plus interest and court costs. Farkas proceeded to give his attorney $5,000.00 to be retained for a fee contract unrelated to the Tri City matter. Tri City levied on its judgment against Farkas and garnished the funds

being held by the attorney. The attorney claimed priority under section 602.10116 and, alternatively, a possessory lien under UCC article 9.

Section 554.9104(c) precludes application of article 9 provisions on possessory liens to those liens provided by other statutes.

Midwest Recovery Services v. Wolfe, 463 N.W.2d 73 (Iowa 1990)

Consumer Protection

Defendant negotiated four checks for cash at a supermarket, all of which were dishonored. In an effort to recover on the dishonored checks, plaintiff threatened defendant with criminal prosecution, wage garnishment, and seizure of assets, and abused defendant over the telephone. District court found plaintiff had violated the Iowa Debt Collection Practices Act, § § 537.7101-.7103.

HELD: A check negotiated for cash is not a consumer credit transaction within the meaning of the Iowa Debt Collection Practices Act. Such a check is written for the purchase of money, not for the purchase of goods.

Kansas City Life Insurance Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)

Farm Tenancy

KCL successfully foreclosed farm mortgage, but then failed in the fall of 1986 to notify tenant Hullinger (who had leased indirectly from receiver appointed in foreclosure action commenced by junior mortgagee) of KCL's intent not to renew farm lease. KCL had consented to appointment of receiver in separate foreclosure proceeding and was aware of Hullinger's status as tenant. KCL timely notified the person who originally leased from the receiver, however.

HELD: KCL failed to comply with the termination provisions of chapter 562.

DISSENT: Majority does not decide whether section 562.6 requires notice to sub-lessees, and it shouldn't be construed to require notice to both. Statute requires that notice shall be served upon either the tenant "or a successor," as opposed to the tenant "and any successor." Sub-lessee acquired all of his rights from a tenant who did not have the right to farm this parcel in the 1987 crop year. It is impossible to identify with certainty all successors in interest to an original farm tenant.

Cole v. First State Bank of Greene, 463 N.W.2d 59 (Iowa 1990)

Foreclosure

Plaintiffs defaulted on a bank loan which was secured by a mortgage on their 83-acre farm. The district court entered judgment for the bank in a foreclosure action. Plaintiffs designated a homestead. The sheriff offered the property without the homestead, but received no bids. He then offered the homestead, but again received no bids. He then offered the entire property, which the bank purchased. The bank immediately assigned the sheriff's certificate, without offering the opportunity to repurchase the property on the same terms and conditions. Plaintiffs filed an application for determination of the fair market value of the homestead, which was not acted upon by the court.

Plaintiffs sued the Bank, claiming that district court's failure to determine fair market value had denied their right to redeem and that Bank's failure to give plaintiffs their right of first refusal violated section 524.910(2).

HELD: Plaintiffs' failure to alert district court to plaintiffs' application for determination of the value of the homestead through a 179(b) motion waived their claim in this action.

The right of first refusal, required by section 524.910(2), was not violated when the bank assigned the sheriff's certificate to a third party before the redemption period had expired. Title to the land had not vested in the bank, therefore the right of first refusal had not been triggered.

Federal Land Bank v. Faught Bros., 468 N.W.2d 793 (Iowa 1991)

Foreclosure

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FLB filed foreclosure actions against mortgagors. Mortgagors filed chapter 11 bankruptcy proceeding. Bankruptcy court modified the stay by lifting it as to the mortgaged real estate "to allow [FLB] to proceed with foreclosure of its mortgages and for enforcement in such foreclosure proceedings of all its rights under those instruments." FLB amended its petition to eliminate the prayer for personal judgments and to insert a prayer for judgment only against the real estate. At FLB's request, district court entered a default judgment and a decree in rem, foreclosing the mortgages. The court also issued a special execution. FLB purchased the tracts at a sheriff's sale and afterwards there remained a substantial deficiency. Mortgagors' bankruptcy case was dismissed, and mortgagors redeemed two of the

three tracts. FLB then applied for a general execution against mortgagors, in order to collect on the deficiency.

HELD: The statutory provisions for following foreclosure and special execution with a general execution to recover deficiency, as authorized by sections 654.5 and .6, does not apply in all instances. FLB's election to withdraw its claim for an in personam judgment rendered the sheriff's sale a satisfaction of the resulting judgment in rem.

Corporate Center Associates v. Total Group Services of Iowa, 462 N.W.2d 713 (Iowa App. 1990)

Secured Transaction

Defendant leased office space from plaintiff under a five-year agreement. Defendant then entered into an agreement with Office Outfitters by which defendant leased office furniture for 60 months with an option to purchase the furniture for $1.00 at the end of the lease period. Defendant subsequently defaulted on a lease agreement with plaintiff, abandoning the office and the furniture. Plaintiff brought action against defendant and against Office Outfitters, seeking unpaid rent and requesting determination that plaintiff's landlord lien was superior to any rights Office Outfitters might have had to the furniture.

HELD: The agreement between defendant and Office Outfitters was a lease intended as a security interest. Iowa Code Section 554.1201(37)(b) states that an option to purchase leased property for no or nominal consideration renders it an agreement to create a security interest.

Schaffner v. Ebel, 464 N.W.2d 460 (Iowa App. 1990)

Q

Security Interest

Purchaser of land gave promissory notes and a mortgage to the Farmer's Home Administration (United States). He defaulted on his contract with the seller and became delinquent on taxes, and subsequently filed bankruptcy. The seller died, leaving each of her children an equal share of the property from the contract.

The devisees petitioned the court to appoint a receiver/referee to sell the property and divide the proceeds among the devisees. The United States claimed an interest in the property by virtue of the promissory notes and mortgage executed by the purchaser. In the meantime, the purchaser rented the farm out, paying the rental proceeds to the receiver/referee. The United States sought priority on the proceeds of the rentals under 31 U.S.C. § 3713 and Iowa Code § 680.7.

HELD: Although United States has priority over other creditors for assets held by a receiver appointed to take possession of a debtor's property, it does not have priority for property which is, as in this case, held for another creditor. Once the property is out of the debtor's hands, or the debtor's representative's hands, priority ceases to exist under these statutes.

United States had a security interest in the property, however, and in its proceeds before forfeiture proceedings began. Therefore, United States was entitled to the rental proceeds.

CONSTITUTIONAL LAW

Ruden v. Parker, 462 N.W.2d 674 (Iowa 1990)

Equal Protection

Rule 8, which authorizes a parent to recover for loss of consortium of a minor child but not an adult child, does not violate equal protection. The legislature had a rational basis for treating the relationship of a parent to a minor child differently from that of a parent to an adult child. The rule did not impose upon a fundamental right or employ a suspect classification.

Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991)

Equal Protection

Section 668.10(1), which grants immunity to municipality for "failing to place, erect, or install [traffic signs or devices,]" does not violate due process or equal protection.

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Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Equal Protection

Bates sued tortfeasor's liability insurer and insurance defense counsel for failing to disclose their discovery of perjured testimony during settlement negotiations that resulted in settlement of case for less than policy limits after trial had started. Bates sought to recover on a theory of bad faith, among others.

HELD: Bates is a third-party to the insurance contract, and has no bad-faith claim for Van Baale's liability insurer's

failure or refusal to settle. Distinguishing between insureds, who have a contractual relationship with the insurer, and third-party claimants, who do not, does not violate equal protection.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at _____ (Iowa 1991)

Equal Protection

Section 668A.1's creation of the civil reparation trust fund and the resulting allocation of punitive damages away from plaintiff does not violate due process or equal protection.

CONTRACTS

Jordan v. IDOT, 468 N.W.2d 827 (Iowa 1991)

Jordan owned and operated mobile-home dealership on Southeast 14th Street in Des Moines (which at that point is State Highway 169). IDOT commenced a road construction project along a portion of 14th Street where Jordan's business was located. In return for granting IDOT a temporary easement onto Jordan's property during the construction phase, Jordan secured IDOT's promise to reduce the planned median's height along the stretch of highway in front of Jordan's business, so that traffic turning left onto Jordan's business would not be impeded.

Before IDOT constructed the median, Jordan sold on installment contract to Jones. IDOT did not perform its promise to reduce the height of the median strip in front of the mobile-home business. Jones defaulted on the real estate contract, ostensibly because of IDOT's breach, and Jordan reacquired the property by forfeiture. Jordan then resold to another party for substantially less than Jones had paid. Jordan sued IDOT for breach of contract, and district court awarded Jordan $75,000.

HELD: Regardless of why Jones defaulted, Jordan can enforce its contract with IDOT and sue for breach of contract, even though breach occurred when Jones was the equitable owner of the property. Since the proper median height was a discretionary decision for IDOT, agreement is not void as against public policy.

Seidler v. Vaughn Oil Co., 468 N.W.2d 474 (Iowa App. 1991)

Accord and Satisfaction

While delivering fuel to Seidler's farm, Vaughn Oil mistakenly put gasoline in his diesel fuel tank. This damaged Seidler's six diesel tractors, and he had to rent two tractors while his were being repaired. Seidler and Vaughn Oil's insurer negotiated Seidler's claim. The insurer issued a check in payment of the rental costs and all of the repairs on five of the tractors, but there was a dispute over repairs to one of the tractors. Seidler cashed the draft. After further negotiations, the insurer sent another draft to pay for the repairs on the remaining tractor. The draft provided that it was "full, final settlement for damage to tractor." Seidler cashed the draft but refused to sign a separate release.

Seidler sued Vaughn Oil for damages. Vaughn Oil moved for summary judgment on accord and satisfaction grounds. Seidler contended he still was entitled to damages for loss of use and reimbursement on a fuel bill, matters that were not subject to the previous payments. District court entered summary judgment.

HELD: Seidler generated a question of fact as to his knowledge of the insurer's intent for the second check. The insurer's factual assertion that Seidler agreed to accept the final check as complete settlement was denied by Seidler.

Verne R. Houghton Insurance Agency, Inc. v. Orr Drywall Co., 470 N.W.2d 39 (Iowa 1991)

Accord and Satisfaction

State Auto insured Orr Drywall through policies purchased from Houghton Insurance Agency. Orr Drywall reported a motor vehicle loss to Houghton. Either Houghton failed properly to notify State Auto or State Auto failed properly to receive and administer such notice. The opinion suggests but does not document that this notice problem resulted in some delay in the adjustment of Orr Drywall's claim.

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After negotiations and mediation, an agreement was drafted that provided for payment by State Auto of $17,000.00, resolution of salvage rights, and a release by Orr Drywall of "any and all claims against State Auto . . . , known and unknown for damages to the insured vehicle." The mediator and Orr Drywall executed this agreement, but State Auto did not. Nevertheless, State Auto paid the $17,000.00 and, in return, Orr Drywall executed a "policyholder's release" by which Orr Drywall "acknowledge[d] that said sum is in full settlement and discharge of any and all amounts due to the undersigned under policy number CC552006 on account of a collision loss . . . ."

Two months later, Houghton Insurance Agency sued Orr Drywall to recover unpaid insurance premiums due on an account. Orr Drywall counterclaimed for breach of contract and breach of fiduciary duty for untimely delays in processing the vehicle-loss claim. Orr Drywall then filed a third-party petition against State Auto for bad-faith delay in processing the claim. District court dismissed Orr Drywall's claims against Houghton and State Auto "because it believed the mediation agreement and policyholder's release, when read together, barred these claims."

HELD: The mediation agreement cannot be merged into the policyholder's release, because its release language is broader than the release language of the policyholder's release. Impossible to hold as a matter of law that the policyholder's release, which limits its terms to "amounts due under the policy upon account of a collision loss" include claims relating to bad faith in the adjustment of the claim. Orr Drywall adduced evidence of "exchanges, negotiations and actions . . . which support Orr Drywall's contention that the parties intended to settle only the contract claim, not the tort claim." Whether Orr Drywall's tort claim is precluded is a matter of the parties' intent and must be determined, on this record, by the trier of fact.

Orr Drywall's alternative argument that the release of State Auto, regardless of its scope, cannot include a release of Houghton Insurance Agency is barred by Orr Drywall's stipulation in district court that Houghton's actions occurred in its capacity as agent of State Auto.

COMMENT: The court viewed the mediation agreement's language on release as much broader than the corresponding language in the policyholder's release. While there is very broad language in the mediation agreement in the paragraph describing State Auto's release of Orr Drywall, the previous paragraph covering Orr Drywall's release of State Auto is really quite similar to the policyholder's release language. In comparing the two agreements, the court quotes from the wrong paragraph of the mediation agreement.

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Sweet v. Allstate Insurance Co., 471 N.W.2d 794 (Iowa 1991)

Accord and Satisfaction

Gregory Sweet was killed in an automobile accident involving an underinsured motorist. Allstate issued an insurance policy to Gregory's father Jaron. Allstate's underinsured motorist provisions applied to Gregory.

Mr. and Mrs. Sweet sought to recover from Allstate under the underinsured motorist coverage. Allstate paid Mr. and Mrs. Sweet $40,000.00 and received their joint execution of a release:

> In consideration of the payment of $40,000.00 by Allstate, . . . the undersigned hereby forever releases and discharges Allstate from any and all liability and from any and all contractual obligations whatsoever under the coverage designated above of policy number 10143453 issued to Jaron Sweet by Allstate and arising out of bodily injuries sustained by Gregory Scott Sweet due to an accident on or about the 17th day of June 1988.

The release was a form in which only the underlined portions were manually entered.

After this settlement, Mr. and Mrs. Sweet opened an estate. Jaron was appointed administrator. Mr. and Mrs. Sweet were Gregory's sole heirs, and his estate had no outstanding creditors. The estate then sued Allstate to recover additional benefits under the underinsured motorist coverage of the Allstate policy.

Allstate moved for summary judgment on the basis of the previous release. District court overruled the motion, holding that "only the personal representative of Gregory's estate had authority to release the wrongful death claim and attendant recovery under Allstate's underinsured motorist coverage." Allstate appealed with permission.

HELD: At least where there are no debts and all beneficiaries agree on division of estate property, beneficiaries have the power to settle estate claims. Accordingly, Mr. and Mrs. Sweet had the power to release any of Gregory's claims that survived his death under section 611.20.

Whether or not the release applies to those claims by Gregory which survived his death, however, is a question of fact that cannot be decided on motion for summary judgment. The release is drafted so that it reasonably could be interpreted to refer either to Mr. and Mrs. Sweet's individual claims or the claims they hold by virtue of being the sole beneficiaries of Gregory's estate. Fact that Iowa law does not permit Mr. or Mrs. Sweet to recover as individuals for loss of services or support as a result of Gregory's death (he was an adult), does not assist Allstate.

> [T]his is indeed a strong argument for interpreting the release as embracing the entire gamut of wrongful death damages. On the other hand, claims which in fact have no basis in law may nevertheless be asserted and settled.

Operative meaning of the release "is to be found in the transaction and its context," and is a question of fact.

Desy v. Rhue, 462 N.W.2d 742 (Iowa App. 1990)

Agency

Randy Rhue desired to purchase a vehicle from a car dealer. Because of Randy's financial problems, the dealer said he would sell the vehicle to him only if he could obtain a co-buyer. Randy's father, Charles, agreed with Randy to become a co-owner. Randy signed a proposed purchase agreement, prepared by the car dealership, which contained the statement, "This agreement is not binding until accepted by the selling dealer or his authorized representative." The dealer did not sign the agreement. Randy took possession of the vehicle and left in it to obtain his father's signature on the agreement. On his way home, he struck and injured a motorcyclist, who sued Randy, Charles, and the dealership. Charles appealed jury verdict entered against him as an owner of the vehicle.

HELD: No agency relationship existed between Randy and Charles. None of the parties believed Randy had the power to bind Charles to an agreement. The dealership's insistence that Charles sign before the dealer signed showed that it did not believe an agency relationship existed. There was no evidence that either Charles or Randy considered Randy an agent.

Rasmussen Heating and Cooling, Inc. v. Idso, 463 N.W.2d 703 (Iowa 1990)

Anti-Competitive Covenant

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Purchaser of Corporation that built and sold boat hoists sued former owners for breach of a covenant not to engage in a similar business for ten years. HELD: The ten-year duration of the covenant not to compete was unreasonable. Supreme Court has not enforced a clause longer than 5 years, and most disputed clauses are shorter still.

Dental Prosthetics Services, Inc. v. Hurst, 463 N.W.2d 36 (Iowa 1990)

Anti-Competitive Covenant

Dental prosthetic company drafted a covenant in defendant's employment contract, prohibiting defendant from directly or indirectly engaging in similar business within a 50

mile radius of the employer for three years after termination of employment. Defendant resigned from the company, opened a prosthetics business outside the restricted area, and began selling products to buyers both within and outside the restricted area.

HELD: When construed against the party drafting the covenant, "directly or indirectly engaging in business" was held to relate to the "bulk of the prosthetic business - the manufacturing process," not incidental sales and services. Defendant's solicitation of business within the 50 mile radius was not a violation of the restrictive covenant.

B & H Apartments Partnership v. Tharp, 466 N.W.2d 694 (Iowa App. 1990)

Assignment

Plaintiffs sold a building to Defendant with an agreement that Defendant would not alter its structure and that Defendant's liability would not cease by assignment of the contract. Defendant assigned the contract to a third party, who gutted the inside of the building. The third party made payments for three years, then disappeared. The building was, at that time, worth less than the amount owing on the contract as a result of the structural alteration.

HELD: Defendant was liable for the deficiency. The assignment did not relieve defendant from liability, and plaintiff's inaction after he discovered that the third party had gutted the building did not constitute novation.

Agri Careers, Inc. v. Jepsen, 463 N.W.2d 93 (Iowa 1990)

Breach

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Employer contracted with an employment agency for its efforts to locate an employee. Agency gave employer several names of prospective employees and background information on each. Employer hired one of the candidates, but refused to pay agency's fee, alleging that agency had failed to return employer's calls and requests for additional information.

HELD: Agency had substantially performed its part of the contract, since it provided the name of the candidate who was eventually hired by Employer. Agency's alleged breaches were not material; employer's only damage was minor inconvenience.

Air Host Cedar Rapids v. Cedar Rapids Airport Commission, 464 N.W.2d 450 (Iowa 1990)

Breach

The provisions of a signed leased between a concessionaire and the Cedar Rapids Airport Commission stated that if a new airport was constructed, the current concessionaire would have the first right to leased space in the new terminal. The terms and conditions of such lease, however, were to be mutually agreed upon by the parties.

The second provision stated that if the concessionaire incurred any expense in planning the new terminal and did not obtain the new lease, the Commission would reimburse the concessionaire for its expenses, not to exceed $20,000 without the written consent of the Commission.

Air Host, the concessionaire, did not obtain a lease in the new airport terminal. Air Host brought this suit claiming breach of contract and fraudulent misrepresentation. The jury found for Air Host and awarded substantial, actual, and punitive damages. The Cedar Rapids Airport Commission appealed.

HELD: Breach of contract claim fails because language pertaining to "first right to lease" is indefinite. When interpreted in connection with the final sentence which states that "the terms and conditions of the lease and license shall be as mutually agreed" it becomes apparent that the first right to lease is subject to future negotiations and agreements between both parties. The court states that generally a contract where the parties agree to a contract on the basis of future negotiations is not enforceable. The motion for directed verdict on the breach of contract claims should have been sustained.

Setterberg v. Sheaffer Eaton, Inc., 473 N.W.2d 217 (Iowa App. 1991)

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Breach

Setterberg contracted with Sheaffer to provide trucking services. The contract provided that Setterberg would haul a minimum of seventy-five truckloads on a round-trip basis each year. The agreement provided that it was "noncancellable by either party except for good cause."

Sheaffer suffered a financial reversal, largely as a result of the market crash in October 1987, and sold one of its product lines. As a result of the sale, Sheaffer did not need trucking services anywhere close to the minimum stated in the contract.

Substantial evidence supported district court's finding that Sheaffer had cancelled the contract for good cause.

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627 (Iowa 1990)

Employment

Plaintiff walked off his job in the maintenance department of a soy bean processing plant after failing to obtain protection from his supervisor's verbal abuse, most of which centered on plaintiff's Catholicism.

Plaintiff's cross-appeal raised the dismissal before trial of his claim for breach of employment contract. Plaintiff claimed that defendant failed to follow policies and procedures set forth in the employee handbook. HELD: Breach of employment contract is not preempted by Chapter 601A, but is a separate and independent cause of action triable to a jury. How plaintiff and defendant perceived the contents of the handbook is an issue of fact. See Cannon, 422 N.W.2d 638 (Iowa 1988).

Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991)

Employment

Hospital and association of hospitals terminated their employment of administrator, allegedly because of his age. Grahek filed a complaint with the civil rights commission, but the commission dismissed it as being filed beyond the 180-day statute of limitations. Administrator then sued his employers for breach of contract, breach of implied covenant of good faith and fair dealing, wrongful termination, fraudulent and negligent misrepresentation, and intentional interference with contractual relations. District court entered summary judgment in favor of defendants, against all of Grahek's claims.

HELD: Grahek's claims for breach of contract, misrepresentation, and interference are separate and independent causes of action, and are not pre-empted by the exclusive remedies provided by chapter 601A for age discrimination. Grahek alleges that defendants breached an employment contract of a certain duration. Motivation would be irrelevant to his contract claim.

Iowa does not yet recognize a cause of action for breach of implied covenant and good faith and fair dealing. If it were valid, it would arise under these facts only by proof of conduct already violative of chapter 601A. Accordingly, chapter 601A would pre-empt such a claim.

Federal Land Bank of Omaha v. Emberton, 460 N.W.2d 488 (Iowa App. 1990)

Formation

Emberton was engaged in a losing livestock operation. He was failing to keep his loans with Production Credit Association (PCA) current. PCA agreed to loan Emberton more money to purchase cattle, in an effort to generate profit. Emberton signed a promissory note for $135,000.00 and a security agreement for 370 cattle as collateral. The agreement indicated that Emberton would purchase 370 cattle for $135,000.00 from Clifton Cattle. Emberton and Clifton signed a livestock contract in which Clifton agreed repurchase the cattle from Emberton. They also assigned to PCA all proceeds from Emberton's sale back to Clifton.

After PCA loaned Emberton the money, Emberton paid for the cattle. Clifton applied the money to Emberton's existing debt, however, and did not deliver cattle to Emberton.

FLB filed a petition for foreclosure against Emberton, and joined PCA and Clifton as junior lienholders. PCA filed a cross claim against Clifton for breach of contract. Clifton denied that it had contracted with PCA. The jury awarded PCA $69,000.00 from Clifton. HELD: PCA adduced substantial evidence of an agreement between Clifton and PCA that Clifton would deliver cattle to Emberton and then in the spring repurchase them.

> The circumstances and negotiations surrounding the formation of this agreement and the documentation executed by the various parties support the conclusion that the PCA and Clifton made an agreement regarding the sale of cattle to Emberton.

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Crookham v. Structural Contractors Limited, 466 N.W.2d 277 (Iowa App. 1990)

Formation

Plaintiff was discharged from employment. Defendant employer decided to pay plaintiff his regular salary for four months and allow him to use his office. Defendant later denied plaintiff access to the company offices because it believed he had revealed inside information. Defendant also retained plaintiff's last three paychecks. The district court dismissed plaintiff's action for intentionally failing to pay wages due because plaintiff failed to show by a preponderance of the evidence that there was an agreement or a set policy for severance payments. Plaintiff appealed, claiming defendant's answer and letters from defendant to plaintiff clearly showed an agreement existed.

HELD: Neither piece of evidence was sufficient to prove a severance agreement existed.

Scheckel v. Jackson County, 467 N.W.2d 286 (Iowa App. 1991)

Formation

Plaintiff submitted bid for public road improvement. County awarded contract to another bidder. Plaintiff sued for breach of contract, contending that his conversation with county engineer in which engineer informed him that his bid was the lowest received gave rise to a contract.

HELD: District court properly granted County summary judgment. "Those that enter into business transactions with a municipality are presumed to know the statutory requirements that the municipality must follow in order to make the transaction a legally binding one." County must jump through several procedural hoops, some of which involve consultations with DOT and the last of which involves formal action by the board of supervisors, before it can execute a contract for construction work. None of this had occurred with plaintiff. Engineer did not have authority to make an oral contract that would be binding on the county.

Fierro v. Hoel, 465 N.W.2d 669 (Iowa App. 1990)

Gifts

Donor of engagement ring subsequently broke the engagement. Donor sued donee, seeking the return of the ring. HELD: An engagement ring given in contemplation of marriage is an impliedly conditional gift; it is a completed gift only upon marriage. If for any reason the wedding is called off, the gift is not capable of becoming a completed gift and must be returned to the donor. NOTE: Court of Appeals of Iowa is following a minority view.

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Engstrom v. State, 461 N.W.2d 309 (Iowa 1990)

Good-Faith

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on theories of negligence, intentional infliction

of emotional distress, violation of due process, and breach of contract. Defendants obtained summary judgment as to all claims.

HELD: Defendants owed no contractual duty of implied good-faith to determine natural father's status.

Irons v. Community State Bank, 461 N.W.2d 849 (Iowa App. 1990)

Implied

Farmers sued bank as a result of financial difficulties and bank's ultimate refusal to cooperate in refinancing of their farming operation through FmHA. HELD: Given the existence of certain contracts between bank and Irons, plaintiffs cannot recover on contract implied in law.

Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991)

Implied Covenant of Good Faith and Fair Dealing

Hospital and association of hospitals terminated their employment of administrator, allegedly because of his age. Grahek filed a complaint with the civil rights commission, but the commission dismissed it as being filed beyond the 180-day statute of limitations. Administrator then sued his employers for breach of contract, breach of implied covenant of good faith and fair dealing, wrongful termination, fraudulent and negligent misrepresentation, and intentional interference with contractual relations. District court entered summary judgment in favor of defendants, against all of Grahek's claims.

HELD: Iowa does not yet recognize a cause of action for breach of implied covenant and good faith and fair dealing. If it were valid, it would arise under these facts only by proof of conduct already violative of chapter 601A. Accordingly, chapter 601A would pre-empt such a claim.

Yost v. City of Council Bluffs, 471 N.W.2d 836 (Iowa 1991)

Impossibility of Performance

Yost contracted with City to provide certain enumerated and unique clean-up services after a tornado. Yost agreed to

(1) construct at an old tree-dumping site 40-foot trenches to contain debris while it is burning,

(2) separate materials not to be burned for other disposal,

(3) place flammable debris into trenches and burn by forced-air induction so as to reduce smoke, and

(4) bury remains in trenches.

City agreed to pay Yost $135,500.

Before Yost could begin his work, the tree-dump caught fire. "Yost and the City officials agreed that the destruction of the trees had eliminated part of the project. On further consideration, the City decided that the fire had fortuitously removed the part of the contract for which it really needed Yost and the rest of the work could be done by anyone." City canceled the contract and used City employees at a cost of $75,000. Yost sued. District court determined that City was legally excused from performance and dismissed Yost's petition. Yost appealed.

HELD: Although fire rendered performance of the entire contract impossible, Yost still could perform substantial portions of the contract. While the forced-air-induction burning was the material portion of the contract, City's expenditure of $75,000 thereafter establishes that the remaining work was substantial. Section 270 of Restatement (Second) of Contracts provides:

> Where only part of an obligor's performance is impracticable, his duty to render the remaining part is unaffected if
>
> (a) It is still practicable for him to render performance that is substantial, taking into account any reasonable substitute performance that he is under a duty to render.

Yost is entitled to recover cost of expenditures made in reliance on contract and lost profits, unless based on conjecture and speculation. Case is remanded for a new trial only on damages.

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Hoover v. Webb, 460 N.W.2d 456 (Iowa 1990)

Interpretation

Wallace sold farmland to Webb. As part of the purchase price, Webb gave Wallace a promissory note secured by a second mortgage. Wallace later purchased land from Huffman. As part of the purchase price, Wallace transferred to Huffman by "Quit Claim Deed" its vendor's interest in the land Wallace sold to Webb. Webb defaulted on its obligations and claimed bankruptcy after first mortgagor foreclosed. Huffman sued Wallace for an unqualified endorsement on the Webb note.

HELD: Because the Wallace-Huffman contract did not include any provision for an endorsement and the method of assignment was by "Quit Claim Deed," the agreement was for other than an unqualified endorsement and thus, placed the burden of loss on Huffman.

Iowa Fuel & Minerals, Inc. v. Iowa State Board of Regents, 471 N.W.2d 859 (Iowa 1991)

Interpretation

After soliciting bids, ISU contracted with Iowa Fuel to pay for 100,000 tons of washed industrial stoker coal per year at $32.28 per ton. This contract was more than 90% of Iowa Fuel's business. The written contract provided specific provisions for adjusting the price and provided under "termination" further matters relating to price adjustment:

> In the event that the coal being supplied becomes unsuitable for combustion either by changes in operation, in equipment or changes in federal or state regulations, [ISU] shall have the option to terminate the contract or reduce the quantity of coal purchased under the contract on 30 days written notice to [Iowa Fuel]. If [ISU] cannot economically utilize the coal supplied under this contract or in the event that [Iowa Fuel's] proven escalation results in a total price that is unreasonable in view of the price of other comparable coals being offered . . . , then this agreement may be renegotiated on 30 days written notice . . . and, failing mutual agreement . . . , contract shall be terminated upon 30 days written notice . . . . Every effort will be made by [ISU and Iowa Fuel] to negotiate in good faith a mutually acceptable price for the coal supplied under this contract before giving notice of termination.

In the first three years of the contract, the parties negotiated two price increases. The board of regents then noticed that ISU was paying substantially more for coal than U of I or UNI, and directed ISU to renegotiate with Iowa Fuel. Negotiations ensued, and Iowa Fuel eventually agreed to reduce its price. ISU also complained about quality of the coal supplied. Three years later, ISU notified Iowa Fuel of ISU's intent to terminate because of Iowa Fuel's failure to deliver the contracted-for quantities and qualities over the last three years.

Iowa Fuel sued, claiming that quantity and quality problems were caused by the price reduction insisted upon by ISU.

After trial, district court awarded Iowa Fuel $200,000 on its "contract claims for improper price adjustments." District court denied all of Iowa Fuel's other contract claims. Both parties appealed.

The Court of Appeals affirmed the district court award of $200,000 to Iowa Fuel, but reversed on Iowa Fuel's $800,000 claim arising out of a price reduction that ISU imposed because of an alleged inability to "economically utilize" coal supplied by Iowa Fuel. On further review, the Supreme Court reinstated the district court's judgment.

On Iowa Fuel's claim that ISU could not terminate the contract, the Court found substantial evidence to support district court's findings that Iowa Fuel's short falls on deliveries over the last three years were substantial and had not been excused in the sense of ISU's right to expect strict performance.

As to Iowa Fuel's $800,000 claim for the price reduction imposed because of ISU's inability to "economically utilize" the coal, substantial evidence supported district court's finding that this price reduction was negotiated by the parties rather than imposed by ISU.

COMMENT: Although both parties appealed and then filed applications for further review, the opinion does not appear to contain any discussion of the $200,000 award to Iowa Fuel.

B & H Apartments Partnership v. Tharp, 466 N.W.2d 694 (Iowa App. 1990)

Novation

Plaintiffs sold a building to Defendant with an agreement that Defendant would not alter its structure and that Defendant's liability would not cease by assignment of the contract. Defendant assigned the contract to a third party, who gutted the inside of the building. The third party made payments for three years, then disappeared. The building was, at that time, worth less than the amount owing on the contract as a result of the structural alteration.

HELD: Defendant was liable for the deficiency. The assignment did not relieve defendant from liability, and plaintiff's inaction after he discovered that the third party had gutted the building did not constitute novation.

Q

Desy v. Rhue, 462 N.W.2d 742 (Iowa App. 1990)

Offer and Acceptance

Randy Rhue desired to purchase a vehicle from a car dealer. Because of Randy's financial problems, the dealer said he would sell the vehicle to him only if he could obtain a co-buyer. Randy's father, Charles, agreed with Randy to become a co-owner. Randy signed a proposed purchase agreement, prepared by the car dealership, which contained the statement, "This agreement is not binding until accepted by the selling dealer or his authorized representative." The dealer did not sign the agreement. Randy took possession of the vehicle and left in it to obtain his father's signature on the agreement. On his way home, he struck and injured a motorcyclist, who sued Randy, Charles, and the dealership. Charles appealed jury verdict entered against him as an owner of the vehicle.

HELD: Bona fide-sale exception of section 321.493 requires at least an agreement that binds the seller, a requirement that was not met. Even if Charles' actions constituted an offer, it was not accepted by dealer.

COURTS

Reichs v. Farmers Commodities Corp., _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Arbitration

Customer of commodities brokerage firm suffered substantial losses and sought to arbitrate its differences with defendant FCC. Federal regulations require a "futures commission merchant" such as defendant to submit to arbitration at the request of the customer.

HELD: Compelling FCC to arbitrate this matter did not violate its due process or equal protection rights or its right to access to the courts to a jury trial. "As a commodities broker FCC may have been compelled to submit to a binding arbitration, but no one compelled FCC to become a commodities broker." FCC also is stuck with the shortcomings and imperfections that it perceives in the arbitration process.

> A refined quality of justice is not the goal in arbitration matters. Indeed such a goal is deliberately sacrificed in favor of a sure and speedy resolution. . . . It is no idle

> coincidence that the words "arbitration" and "arbitrary" are both derived from the same Latin word.

Without deciding whether federal-court standard of review on arbitration decisions - fundamentally irrational or in manifest disregard of the law - differs from Iowa's substantial evidence standard, record permits no interference of arbitration decision under either standard.

COMMENT: Because this was a tort case, the court ignored arguments by both sides that focused chapter 679A, which "addresses only written contracts for arbitration," and specifically exempts 'any sounding in tort whether or not involving a breach of contract.'"

Hunter v. Union State Bank, 468 N.W.2d 456 (Iowa 1991)

Death of Judge

Parties tried case to Judge Van Wifvat. He died after case was submitted but before he completed his ruling. Judge Morr reviewed the file and talked to Van Wifvat's law clerk. Judge Morr learned that Van Wifvat had discussed the case with his law clerk and told him he was going to rule in favor of defendants. He had instructed his law clerk to draft a ruling consistent with the defendant's proposed findings of fact and conclusions of law. Morr signed the ruling prepared by the law clerk without reviewing Van Wifvat's notes or the trial transcript, but did so only after discussing the matter with counsel and advising them of how he intended to proceed, unless either side objected. Receiving no objection, Morr signed the ruling. Plaintiffs filed a motion for new trial and judgment notwithstanding the verdict and complained in part therein that the procedure violated rule 367(b).

HELD: District court did not comply with rule 367(b), which requires that another judge attending to a matter under advisement of a judge who has died shall "render a decision," but only "if by a review of the transcript or reargument he can, in his opinion, sufficiently inform himself to enable him to render a decision." Otherwise, the new judge must preside over further proceedings on a scope of his determination. "[T]he intent of [rule] 367(b) is that the ultimate decision in the case be that of the successor judge."

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

Interlocutory Order

District Court Judge Gaul overruled defendants' motions to dismiss and overruled (after first sustaining and then reconsidering) defendants' motions for summary judgment. One year later and just before trial, District Court Judge Vipond set defendants' motions for summary judgment for rehearing and reconsideration. After hearing, judge Vipond sustained the motions for summary judgment.

HELD: Judge Vipond had the power to "review and change a prior interlocutory ruling of another district judge in the same case." Hoefer's criticism of this rule as fostering judge-shopping, creating mini-appellate courts, causing unnecessary delay, and breeding uncertainty in decision making might have merit if the rule were taken to the extreme. Here, however,

> [n]one of the litigants sought out judge Vipond . . . . [H]e gave the parties time to brief the issues anew. Substantial time had elapsed [and] . . . additional discovery [had occurred]. Finally, no delay occurred because the judge's final decision was rendered prior to the date originally set for trial.

Ahls v. Sherwood, 473 N.W.2d at _____ (Iowa 1991)

Interlocutory Order

Ahls sued Vacationland and Optimus, the seller and a component manufacturer, respectively, of a heater that exploded in the Ahls home. District court dismissed Optimus on personal jurisdiction grounds. Vacationland then cross-petitioned against Optimus for contribution and indemnity. District court dismissed Vacationland's cross-petition on the ground that the previous dismissal was the law of the case. The Supreme Court rejected Vacationland's request to appeal in advance of final judgment.

On the day set for trial, October 3, 1989, Ahls settled with all remaining defendants. District court entered an order noting the settlements and assessing a $500.00 late settlement penalty. The dismissal documents were filed on November 15. On November 27, Vacationland filed a notice of appeal from district court's dismissal of its cross-petition against Optimus. Optimus moved to dismiss the appeal.

HELD: The order dismissing Ahls' claim against Optimus was an interlocutory order and, therefore, subject to change at any time. As such, it cannot constitute the law of the case. District

court should have proceeded to adjudicate Optimus' motion to dismiss in light of Vacationland's resistance.

Ezzone v. Hansen, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Judicial Estoppel

Ezzone sued a bank, bankers, a lawyer, and a business advisor for conspiring to permit the business advisor to "steal" Ezzone's corporation. All of Ezzone's claims depended upon him establishing first that he was the sole owner of the corporation. In the several months before filing suit, however, Ezzone testified under oath in three other legal proceedings (his divorce, a judgment debtor exam, and a hearing on his application for social security disability) that he had no ownership interest in the corporation. In this case, he affirmatively contends and testifies that his testimony in those proceedings was perjury.

Defendants moved for summary judgment on the doctrine of judicial estoppel. District court sustained the motion and dismissed Ezzone's lawsuit.

HELD: "Without totally rejecting any possibility of applying the doctrine in the absence of privity or prejudice," judicial estoppel will not be applied in this case, because no moving defendant was involved in any of the other proceedings in which Ezzone claims to have perjured himself, and because no moving defendant can claim prejudicial reliance upon the perjured testimony in those other proceedings. "Although harsh consequences should attend the giving of false testimony, we see no need to include among such consequences an arbitrary forfeiture of property to the benefit of third persons who were in no way prejudiced by the falsehoods."

COMMENT: Court's previous listings of the elements of judicial estoppel never mentioned privity or prejudice. See, e.g., Vennerberg Farms, Inc. v. IGF Insurance Co., 405 N.W.2d 810 (Iowa 1987). Most courts have viewed judicial estoppel as protecting the judicial system from injury or abuse by perjurers, have not examined the status of the party raising the doctrine as a defense, and regard such elements as irrelevant to the policies furthered by the doctrine.

Q

Central Life Insurance Company v. Aetna Casualty and Surety Co., 466 N.W.2d 257 (Iowa 1991)

Jurisdiction

Central Life Insurance Company (Central) was insured under a policy issued by Aetna Casualty and Surety Company (Aetna).

After a fire damaged Central's buildings, Central invoked an appraisal process under a policy provision by which each party would choose a "disinterested" appraiser, who would select an umpire. Appraisers could not agree on umpire, so Central and Aetna asked a district court judge, informally, to select an umpire. The judge did so. The umpire's decision resulted in litigation.

The Supreme Court set aside the judgment entered on the prevailing party's action to enforce the umpire's decision for reasons unrelated to the district court's role in selection of the umpire. In dicta, however, the court said that the judge should have declined to get involved. District court did not have jurisdiction to appoint an empire for an appraisal without a statutory duty to do so or a formal action. An agreement between parties or an oral request from parties does not confer jurisdiction.

DAMAGES

Welter v. Humboldt County, 461 N.W.2d 335 (Iowa App. 1990)

A person hired by the county to spray ditch for weeds caused damage to trees planted on plaintiff's property and tainted popcorn in the corn crib near where the sprayer was parked.

HELD: When trees are put for special use, such as for windbreaks or shade, the measure of recovery for loss of the trees is the difference in the value of the property before and after the destruction of the trees. When the trees had no special use, the measure of recovery for loss of trees is commercial market value of trees at the time the damages occurred. When the trees can be replaced, the measure of damages for loss of trees is cost of replacement.

Macal v. Stinson, 468 N.W.2d 34 (Iowa 1991)

Breach of Contract

Macal sold farm to Stinson on contract that required down payment of 10% and balance at time of possession. Macal was unable to finance purchase and breached contract at time of possession date. Macal had intended to use proceeds to pay construction costs on a new home, so Macal had to secure a home-mortgage loan.

Macal sued Stinson for breach of contract and recovered the difference between contract price and fair market value of the

property at time of breach, minus the down payment. Macal appealed from district court's refusal to allow recovery of interest paid by Macal on home mortgage that was necessitated by Stinson's breach.

HELD: Neither party "anticipated the drastic drop in farm values which precipitated the breach, nor its consequences." Macal's home-mortgage loan "is too remote to qualify as arising naturally from the breach." It was not foreseeable that Macal would have to borrow money at a higher rate if Stinson breached the contract.

COMMENT: Court initially noted that Macal received interest on money due from the date of breach at 5% and interest at 10% from the date of action. "To allow both statutory and actual interest for use of the same money at the same time would be duplicative and thus inimical to a fundamental canon of the law of damages." Court then proceeded to examine whether or not Macal was entitled to recover the home-mortgage interest as an item of consequential damages, because that amount would have exceeded the interest on money due. If recoverable, Macal apparently would have been entitled to elect between them.

Yost v. City of Council Bluffs, 471 N.W.2d 836 (Iowa 1991)

Breach of Contract

Yost contracted with City to provide certain enumerated and unique clean-up services after a tornado. Before Yost could begin his work, the tree-dump caught fire. City canceled the contract and used City employees at a cost of $75,000. HELD: Yost is entitled to recover cost of expenditures made in reliance on contract and lost profits, unless based on conjecture and speculation.

Jordan v. IDOT, 468 N.W.2d 827 (Iowa 1991)

Q

Breach of Contract

Jordan owned and operated mobile-home dealership on Southeast 14th Street in Des Moines (which at that point is State Highway 169). IDOT commenced a road construction project along a portion of 14th Street where Jordan's business was located. In return for granting IDOT a temporary easement onto Jordan's property during the construction phase, Jordan secured IDOT's promise to reduce the planned median's height along the stretch of highway in front of Jordan's business, so that traffic turning left onto Jordan's business would not be impeded.

Before IDOT constructed the median, Jordan sold on installment contract to Jones. IDOT did not perform its promise to

reduce the height of the median strip in front of the mobile-home business. Jones defaulted on the real estate contract, ostensibly because of IDOT's breach, and Jordan reacquired the property by forfeiture. Jordan then resold to another party for substantially less than Jones had paid. Jordan sued IDOT for breach of contract, and district court awarded Jordan $75,000.

Jordan's expert witness testified that he approximated a present-value of the Jones contract because Jordan gave Jones a preferential interest rate and did not require a down payment. With interest, the expert testified that the total amount due Jordan "rounds to $77,000." District court awarded $75,000.

HELD: "Although greater specificity would have aided this court in determining how the district court arrived at the amount of damages awarded, this failure is not critical given the nature of plaintiff's proof." Because Jordan waived its claim against IDOT for the "taking" of its property, it is appropriate to measure Jordan's damages by determining the effect on the value of Jordan's property. Jordan is not entitled to interest on that amount, however. Jordan's right to interest is limited to pre-judgment interest.

Ruden v. Parker, 462 N.W.2d 674 (Iowa 1990)

Consortium

Rule 8, which authorizes a parent to recover for loss of consortium of a minor child but not an adult child, does not violate equal protection. The legislature had a rational basis for treating the relationship of a parent to a minor child differently from that of a parent to an adult child. The rule did not impose upon a fundamental right or employ a suspect classification.

Q

Grodt v. Darling, 472 N.W.2d 845 (Iowa App. 1991)

Consortium

Grodt and Darling were involved in an automobile accident. Grodt and his wife sued Darling. Jury returned a verdict finding Grodt 60% at fault and Darling 40% at fault and a verdict in favor of Darling on Mrs. Grodt's claim for loss of consortium. Mrs. Grodt appealed.

HELD: Substantial evidence supported the jury's decision that Mrs. Grodt's loss was insufficient to support a monetary award.

> The evidence showed that Mr. Grodt, who was 69 at the time of the accident, had been

suffering from a progressive form of hereditary spastic paraparesis. Additionally, the evidence indicated Mr. Grodt had given up many activities prior to the accident due to this disability. It was shown that he had used forearm walkers prior to the accident and had complained of previous neck pain and incontinence prior to the accident.

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627 (Iowa 1990)

Emotional Distress

Plaintiff walked off his job in the maintenance department of a soy bean processing plant after failing to obtain protection from his supervisor's verbal abuse, most of which centered on plaintiff's Catholicism. Plaintiff commenced a civil rights action against the employer, and included a claim for intentional infliction of emotional distress. Trial to the court resulted in a judgment for, among other things, emotional distress damages.

HELD: Plaintiff adduced insufficient evidence of severe emotional defense and causation, primarily because he failed to offer expert medical testimony. DISSENT: Without describing it, three justices found sufficient evidence of severe emotional distress.

COMMENT: According to majority opinion, plaintiff testified that he had lost 50 pounds, had become ill with colitis resulting in as many as 20 bloody stools a day, and had suffered a deterioration in his sex life.

Engstrom v. State, 461 N.W.2d 309 (Iowa 1990)

Q

Emotional Distress

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on theories of negligence, intentional infliction of emotional distress, violation of due process, and breach of contract. Defendants obtained summary judgment as to all claims.

HELD: No outrageous conduct occurred, as a matter of law.

Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Emotional Distress

Bates and Van Baale drove vehicles that collided at an intersection. Bates at first was unsure of who had the green light, acknowledged to the investigating officer at the hospital that his light "may have been red," and later claimed that he had the green light. Van Baale and his passenger, Hedlund, insisted that Van Baale had the green light. The officer issued Bates a summons. Bates and Van Baale testified at the traffic trial, and Bates was acquitted.

Bates sued Van Baale. Allied hired counsel La Suer to defend Van Baale. At the time of trial, La Suer believed the case was defensible. A number of facts supported his conclusion. Van Baale and Hedlund both insisted that Van Baale had the green light. The police officer would testify about Bates' concession in the hospital. Bates' insurer had paid Van Baale's property damage claim and Hedlund's personal injury claim.

After trial had commenced, Hedlund told La Suer that he had been lying and that Van Baale had run a red light.

La Suer immediately advised the Allied adjuster, who authorized La Suer to spend up to the policy limits of $20,000.00 to settle. La Suer confronted Van Baale, who then admitted that he ran a red light. La Suer then negotiated a settlement for $15,000.00 without disclosing to Bates or his counsel what he had learned.

Bates then sued Allied, Van Baale, and La Suer for bad faith, unfair trade practices, fraud, and intentional infliction of emotional distress. Allied and La Suer moved for summary judgment, which was granted.

HELD: Plaintiff has failed to show that he has suffered "severe or extreme emotional distress." Plaintiff claimed anger, loss of sleep, and unhappiness due to preoccupation with his treatment by the legal system.

Q

Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1990)

Excessive

During televised meeting before the city council a property sale, an attorney made a statement that he did not know what the rival bidder would use the property for, other than extortion. Bidder sued for slander. Jury found against attorney.

HELD: Damage award of $250,000.00 is excessive. Rees owned and operated a mail service business in Des Moines. Although the potential for substantial consequence from the defamation exists, Rees did not prove any injury to his reputation or any suffering of emotional distress. District court shall retry damages issues.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at _____ (Iowa 1991)

Good Will

Shepherd's building suffered damage when excavation for city sewer project next door cracked a wall. The crack and particularly the defendants' continuation of the excavation work after the crack was discovered interfered with Shepherd's conduct of his business, because part of his building was rendered unusable during the remainder of the construction project. HELD: Shepherd was entitled to recover damages for loss of good will, even though his business was not profitable.

Cowan v. Flannery, 461 N.W.2d 155 (Iowa 1990)

Inadequate

Jury found defendant in car accident litigation 70% at fault and awarded past medical expense and future medical expense, but awarded no damages for loss of future earning capacity, past loss of bodily function, future loss of bodily function, or past or future pain and suffering. Plaintiff testified extensively on his pain and discomfort, and provided corroborating testimony from family members. District court did not grant plaintiff's motion for new trial.

HELD: "It is illogical to award past and future medical expense incurred to relieve headache, neck and back pain and then allow nothing for such physical and mental pain and suffering." Special verdicts were inconsistent, and damage issues must be retried.

Q

Kansas City Life Insurance Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)

Punitive Damages

KCL successfully foreclosed farm mortgage, but then failed in the fall of 1986 to notify tenant Hullinger (who had leased indirectly from receiver appointed in foreclosure action

commenced by junior mortgagee) of KCL's intent not to renew farm lease. KCL had consented to appointment of receiver in separate foreclosure proceeding and was aware of Hullinger's status as tenant. In the spring of 1987, when Hullinger applied for USDA's 1987 price support and production adjustment program, KCL notified the USDA that it, not Hullinger, was entitled to register the farm for the program, and it refused to consent to Hullinger's application.

HELD: Although evidence supported plaintiff's verdict for intentional interference with prospective business advantage/existing contract, Hullinger did not adduce substantial evidence of malice in order to support punitive damage verdict.

Kiner v. Reliance Insurance Co., 463 N.W.2d 9 (Iowa 1990)

Punitives Damages

Employee who made workers' compensation claim and received benefits sued Reliance for bad faith after Reliance refused to pay for certain medications. Reliance was of the opinion that Kiner had developed a drug-dependency problem and wanted him to obtain an evaluation and assistance. District court found the jury's verdict of $550,000.00 in punitive damages to be excessive and ordered a new trial on all issues in the bad-faith claim. Kiner appealed and Reliance cross-appealed.

HELD: District court did not abuse its discretion in requiring a new trial of all issues because of the inordinately high verdict on punitive damages.

Air Host Cedar Rapids v. Cedar Rapids Airport Commission, 464 N.W.2d 450 (Iowa 1990)

Q

Punitive Damages

Concessionaire brought suit against the Cedar Rapids Airport Commission for breach of contract and fraudulent misrepresentation. The jury awarded substantial punitive damages. Although the Commission's revenues were not generated by direct taxes, the court refused to overrule Parks v. City of Marshalltown, 440 N.W.2d 377 (Iowa 1989) which held that a municipality could not be held liable for punitive damages.

Smith v. Smithway Motor Express Inc., 464 N.W.2d 682 (Iowa 1990)

Punitive Damages

Truck driver was fired after filing a claim for workers' compensation benefits. Truck driver brought suit against employer for retaliatory discharge. Jury awarded $100,000 in punitive damages. HELD: Because the facts occurred before Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988), punitive damages should not have been awarded.

Coster v. Crookham, 468 N.W.2d 802 (Iowa 1991)

Punitive Damages

In 1974 John and Eleanor Coster placed their farms and farming operation in trust, with attorney Crookham serving as trustee. In 1982, Iowa Trust & Savings Bank (Iowa Trust) began lending money to the trust and the Costers individually. Crookham and the Costers subsequently secured Iowa Trust's agreement to provide bookkeeping and accounting services and other management services for the trust and for Costers personally. Iowa Trust, the Costers, and Crookham signed a written agreement (content of which is not described in the opinion). Iowa Trust continued to loan money to the trust after it commenced to provide services to the trust that normally would be performed by a trustee.

With court order based on application that did not disclose true purpose for distribution, Crookham distributed $90,000.00 to Coster for Coster's use in assisting a friend implicated in a check-kiting scheme.

In 1976 Crookham and Gordin, the sole owners of G & L Industries, acquired the stock of Muscatine Lighting Company (Musco). Terms of the stock-purchase agreement provided that the owners of Musco were to be released from Musco's existing financial obligations to First National Bank of Muscatine (FNB). After reviewing financial statements of Crookham, Gordin, and G & L Industries, FNB agreed to release Musco's owners. In order to obtain an SBA release of those personal guarantees, however, FNB required additional financing. As trustee of the Coster trust, Crookham signed a guarantee of the new investors' pledges to FNB on behalf of the trust, which guarantee was accepted by FNB. G & L proceeded to purchase Musco, and FNB never called upon the Coster trust to make any payment under the guarantee. FNB eventually released the Coster trust from the guarantee.

Q

Costers sued Crookham for (1) self-dealing in connection with the Musco transaction and (2) mal-administration in connection with distributions of principal to John Coster at his direction and despite the spendthrift nature and purposes of the trust.

Plaintiffs sued Iowa Trust, claiming Iowa Trust became a co-trustee and that its subsequent loans constituted self-dealing.

Jury found that Crookham had engaged in self-dealing in the Musco matter. Jury also found that Crookham had engaged in mal-administration with respect to certain distributions.

As to the mal-administration claim against Iowa Trust, jury found that Iowa Trust had served as a trustee, that it had loaned money to the trust at interest, and that it therefore had profited from self-dealing, and had not obtained authority to do so. Jury awarded damages in the amount of the interest earned by Iowa Trust.

Jury awarded punitive damages against Crookham in excess of $650,000. It awarded punitive damages against Iowa Trust in excess of $170,000.

Crookham's conduct relevant to the mal-administration claim was not sufficiently egregious to support a claim of punitive damages. Because the instructions did not require the jury to limit its punitive-damage focus on the self-dealing claim in connection with Musco (Crookham's conduct in regard to the Musco transaction was sufficiently egregious), plaintiffs' punitive damage claim against Crookham must be retried. Iowa Trust's conduct in connection with loaning money in violation of section 633.155 and in violation of its fiduciary responsibilities was not sufficiency egregious to support a claim of punitive damages.

COMMENT: The court continues to be concerned with punitive damage awards:

> A careful reading of our cases on the subject, especially those filed during the past decade, discloses that demands for punitive damages far exceed the number of cases where they are appropriate. Their assessment has always called for utmost discrimination because, by their very nature, they involve utilization of a rightful indignation which must not amount to passion or prejudice.
>
> We have observed the extravagant proliferation of punitive damage claims with concern, and have repeatedly pointed out that such damages cannot arise from conduct which is merely objectionable.

Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at _____ (Iowa 1991)

Punitive Damages

City contracted with engineer Brice to prepare plans and specifications for city sewer project. City contracted with Peterson to perform the excavation work.

Brice's plans did not detail any protective methods to be used for Shepherd's property. Peterson used another engineer to design a protective system, and Brice approved those drawings. Nevertheless, Peterson departed from his own engineer's drawings and conducted the excavation in a manner that caused a wall in Shepherd's building to crack. When the crack was discovered, Brice, Peterson, and Shepherd met and discussed it. Peterson elected to proceed in the same manner. He instructed Shepherd not to use the damaged corner while the construction proceeded and to place scaffolding inside the building. Brice sent three letters expressing concern over further deterioration of the wall. At the end of the project, when the scaffolding was removed, the entire wall collapsed.

Shepherd sued Brice and Peterson. After trial, the jury assessed 30% of the fault against Brice and 70% against Peterson. The jury awarded compensatory damages including loss of good will, and punitive damages. By special verdict, the jury found that Peterson's conduct was not directed specifically at Shepherd. District court allocated 25% of the punitive damage award to Shepherd and 75% to the civil reparation trust fund. All parties appealed.

HELD: Shepherd adduced substantial evidence of wrongful conduct committed and continued by Peterson with a willful or reckless disregard for Shepherd's rights. As to distribution of punitives, jury found that Peterson's conduct was not directed specifically at plaintiff. Substantial evidence supported jury's finding. Section 668A.1's creation of the civil reparation trust fund and the resulting allocation of punitive damages away from plaintiff does not violate due process or equal protection.

Q

National Bank and Trust Co. v. Campbell, 463 N.W.2d 104 (Iowa 1990)

Punitive Damages

Campbell engaged in check "kiting," and National Bank and Trust Company (NBT) acquiesced in the practice until it was forced to control it. NBT eventually sought security for the float, and sought to bring Campbell in line with lending limits to avoid criminal and civil liability. Campbell transferred part of the insecured debt to his children to bring his debt within lending limits, but it was understood that he would remain liable for the

debts. He gave NBT a quit claim deed to his farm, with the understanding that the deed was given only to meet banking regulations and that Campbell would continue to own, maintain, and control the farm. The Campbells continued to treat the farm as their own. NBT insisted on a lease to satisfy bank examiners. NBT referred to these events as paper transactions to satisfy examiners.

NBT gradually but eventually took control of the farm and eventually terminated the tenancy and sued the Campbells for "back rent." The Campbells brought a counterclaim against NBT for fraud. The court dismissed NBT's claims and awarded Campbell compensatory damages. Both parties appealed.

HELD: Although NBT committed fraud, district court did not err in refusing to award punitive damages. Punitive damages are discretionary, and are not a matter of right.

Fernandez v. Curley, 463 N.W.2d 5 (Iowa 1990)

Punitive Damages

Plaintiff was awarded punitive damages as a result of defendant's willful and wanton misconduct in driving while intoxicated. In disbursing the punitive damages, district court directed that plaintiff's attorney fees and expenses be paid from the award, and that plaintiff be paid 25 percent of the net, with the remainder to be paid to the civil reparations fund pursuant to section 668A.1(2)(b).

HELD: When a defendant's willful and wanton misconduct is not specifically directed at plaintiff, plaintiff is entitled to 25 percent of the total amount punitive damages awarded, before costs and fees are deducted. If the award is not large enough to pay costs and fees, however, these costs and fees should be paid before any portion is distributed to plaintiff. The term "fees" within section 668A.1(2)(b) means reasonable attorneys fees, which may include a reasonable contingent fee. The term "costs" within section 668A.1(2)(b) does not mean "taxable court costs." Those costs should be paid by the party losing the case. Rather, "costs" within the statute means "reasonable costs of litigation specifically attributable to the punitive damages claim . . . . This includes, but is not limited to, the nontaxable portion of deposition costs, and those expert witness fees reasonably occurred but which exceed the limit provided in section 622.72."

Kansas City Life Insurance Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)

Remittitur

In claim by farm tenant against foreclosing mortgagee for interfering with tenant's attempts to sign up for price support and production adjustment programs, jury awarded tenant several thousand dollars more in lost profits from farming operation than best view of plaintiff's evidence as to corn prices and expenses permitted. Plaintiff adduced evidence of the actual price range for corn during relevant crop year. HELD: In establishing remittitur amount, district court did not abuse its discretion in using highest dollar figure that plaintiff's evidence would support.

O'Tool v. Hathaway, 461 N.W.2d 161 (Iowa 1990)

Speculative

District court held defendants liable for flooding of plaintiffs' basement, caused by break in defendants' soil conservation terrace. District court refused to allow recovery for labor costs incurred by plaintiffs in repairing their own basement, because the amount of this expense was "speculative." Plaintiffs did the repair work themselves and with the assistance of friends.

HELD: Mere fact that a party performs his or her own repairs rather than hiring a third party to do the work does not preclude recovery for labor costs. The court reiterated its rule that where the amount of damages, rather than the occurrence of damage, is speculative, the plaintiff still is entitled to recover.

Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990)

Wrongful Discharge

In a retaliatory-discharge case, employee was entitled to recover lost "future wages," notwithstanding some problems with speculation. Employee must prove that he would have been employed subsequent to the date of trial, but for the retaliatory discharge. "The jury must then determine the likely duration of Smith's employment at SMX. The proper award would then be the difference between Smith's wages at SMX and his wages at his new job for that period. This amount must then be reduced to present value."

EVIDENCE

Farmers State Bank v. United Central Bank, 463 N.W.2d 69 (Iowa 1990)

Collateral Source Rule

FSB loaned money to a farmer under three notes, and UCB purchased loan participation in the notes. After the notes were due, FSB consolidated them into one. UCB refused to continue as a loan participant in the renewal of the loan. JEMS, the parent corporation of FSB, then participated in a loan to avoid banking regulation violations by FSB.

Following a loss on the loan, FSB and JEMS sued UCB for reimbursement for the loss attributable to UCB's failure to renew its loan participation, claiming that a loan officer of UCB had promised to renew. FSB sought to establish liability by UCB to FSB for damages in the amount of JEMS' payment by relying on collateral source rule.

HELD: The collateral source rule does not apply to the payment by JEMS for participation. JEMS' payment could not be traced to any categories of payment or benefit envisioned by the rule, such as an insurance policy, employment benefit, etc.

State v. Johnson, 473 N.W.2d 236 (Iowa App. 1991)

Doctor-Patient Privilege

Physician's testimony that defendant told the physician during e.r. treatment that he had been driving was admissible in OWI prosecution in which defendant denied he was the driver, notwithstanding physician-patient privilege. Defendant's statement had no bearing on the physician's treatment.

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State v. Murphy, 462 N.W.2d 715 (Iowa App. 1990)

Hearsay

Defendant was convicted of indecent contact with a child. On appeal the court held that a statement by a witness that one victim called the defendant a pervert while he wrestled with her was admissible under the excited utterance exception to the hearsay rule. Because the victim was under stress or excitement caused by defendant's inappropriate touching, the remark was an excited utterance as described in Rule of Evidence 803(2).

COMMENT: It appears, of course, that defendant denied an improper touching of the declarant. If so, isn't this reasoning circular?

Hughes A. Bagley, Inc. v. Bagley, 463 N.W.2d 423 (Iowa 1990)

Hearsay

In an action for permanent injunction to prevent contact by wayward son with rest of family, testimony that witness had heard from another that defendant threatened to kill the witness was hearsay if offered to prove the truth of the threat, but was admissible to prove its effect on the witness.

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Hearsay

Witness returned to state from Florida to testify for plaintiff. Defendant subpoenaed witness, but witness returned to Florida after testifying in plaintiff's case in chief. HELD: District court did not abuse its discretion in permitting defendant to introduce witness' deposition testimony, the content of which was neither irrelevant nor cumulative.

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 461 N.W.2d 291 (Iowa 1990)

Insurance

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer for underinsured motorist coverage, all in one action. The estate settled with the driver's liability insurer before trial. The jury determined the damages that the estate was legally entitled to recover against the driver, and the court entered judgment against Farm Bureau for its underinsured motorist coverage limits.

HELD: No error in permitting plaintiff to introduce evidence of "the policy limits available under both the underinsured motorist coverage of [Farm Bureau's] policy and [the underinsured driver's] liability policy. . . . Evidence of the insurance limits . . . was offered by the estate to prove its claim under the insurance contract. In order to recover, the estate necessarily must prove the existence of the insurance contract and its terms. Any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms."

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Jury View

Defendant leased scaffolding to plaintiff's employer for use on a construction site. Defendant supplied a frame by one manufacturer and planks by another, so there was not a secure fit. Defendant adduced evidence that an inspection by plaintiff prior to using the scaffolding would have disclosed the incompatibility and resulting risk of injury.

HELD: District court's refusal to permit plaintiff to introduce similar scaffolding parts or photographs of same as evidence, or to permit jury view of a scaffolding assembly, was not an abuse of discretion.

Oldham v. Shenandoah Community School Dist., 461 N.W.2d 207 (Iowa App. 1990)

Opinion Testimony

Child was injured during recess at school. His parents sued. At trial, court permitted plaintiffs' expert "to testify at great lengths as to the safety and procedures that normally should accompany playground areas. HELD: Without describing what portions of expert's testimony were excluded by district court, other than to describe them as "based on the standards of care the school district was responsible for in the maintenance and supervision of its playground area," the Court of Appeals found no abuse of discretion.

Hughes A. Bagley, Inc. v. Bagley, 463 N.W.2d 423 (Iowa 1990)

Q

Opinion Testimony

In an action for permanent injunction to prevent contact by wayward son with rest of family, witness' opinion that defendant was capable of committing violence, based on her observations and perceptions of defendant's behavior, was helpful and permissible under rule 701.

Security Mut. Ins. Co. v. Board of Review, 467 N.W.2d 301 (Iowa App. 1991)

Opinion Testimony

In district court appellate proceeding on taxpayer's protest of property-tax assessment, expert could not identify five of the 15 properties he considered in formulating his valuation opinion, and could not opine whether his opinion would be different if only those five properties were considered. HELD: No abuse of discretion in permitting expert's opinions. Defects in expert's testimony went to weight, not foundation.

Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991)

Opinion Testimony

Nichols and Schweitzer were operating vehicles in the same direction on state highway. Nichols moved into left land to pass Schweitzer who was stopped, slowing down, or stopping. Nichols did not return to his lane before striking an oncoming vehicle operated by West in the left lane. Nichols was killed, and West was injured. Nichols' estate and West sued Schweitzer.

At trial, Schweitzer attempted to adduce testimony from the primary investigating officer as to whether or not the Schweitzer vehicle was moving when the Nichols vehicle started to pass. The officer specifically disclaimed accident-reconstruction-expert status. His opinion was based strictly on the statements of witnesses. District court refused to permit the opinion.

HELD: No abuse of discretion in prohibiting the trooper's opinion testimony. "[I]t is clear that trooper Kinseth's opinion was strictly his weighing of the factual discrepancies in four witnesses' statements, and his conclusion as to who recalled the facts most accurately. . . . Trooper Kinseth possessed no . . . skills superior to that of the jury that would aid in their evaluation of the testimonial evidence offered by the other witnesses."

Q

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Prior Inconsistent Statement

In social host/under-age drinker case, a defense witness testified that plaintiff and plaintiff's driver (the alleged under-age drinker) did not drink alcohol at defendants' home on the night of their one-vehicle accident. On cross, plaintiff's counsel showed the witness an unsworn and unsigned transcript of a statement by the witness to an insurance investigator. Witness could

not recall the interview, would not admit or deny that it occurred, and was not questioned on specific answers in the transcript. The district court sustained foundation objections to the exhibit when plaintiff later attempted to introduce the transcript through the investigator.

The transcript contained equivocal statements by the witness about the plaintiff's and driver's drinking:

> (1) "I'm sure they might have had a couple."
> (2) "I just wasn't really paying attention to them . . . . I can't really say that they were in there drinking up or anything."

HELD: Considering the statement transcript in its entirety, there is "little material variance between these statements and the trial testimony." Even if they were inconsistent, the transcript "was so innocuous" that its rejection as an exhibit could not be prejudicial. Plaintiff "fully impeach[ed]" the same witness with another, signed affidavit.

COMMENT: Court expressly declined to decide issue on the foundational grounds relied upon by the district court. Rule of Evidence 613(b) requires that witness be "afforded an opportunity to explain or deny [the statement]."

Hughes A. Bagley, Inc. v. Bagley, 463 N.W.2d 423 (Iowa 1990)

Relevance

In an action for permanent injunction to prevent contact by wayward son with rest of family, evidence of a prior injunction against defendant to prevent him from contacting his ex-girlfriend was relevant. It showed defendant's capacity to threaten and intimidate others and made witness' reasonable apprehension of harassment more likely.

Fernandez v. Curley, 463 N.W.2d 5 (Iowa 1990)

Relevance

Defendant admitted being negligent and intoxicated at the time of an automobile collision. District court excluded evidence under rule 403, pertaining to defendant's prior OWI conviction, because the evidence would be more prejudicial than probative. HELD: No abuse of discretion.

Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Relevance

Plaintiff's decedent bar-hopped by boat along the shore of Clear Lake. Eventually, he drove his boat into an unlighted dock and was killed. His blood alcohol level was .382. Plaintiff sued several bars, and went to trial against one. Jury returned a defense verdict.

At trial, defendant adduced testimony by bar waitress over plaintiff's objection that she "tended to avoid Hobbiebrunken as much as possible because he once offered her a drink and asked if she wanted to go for a ride in his Corvette." HELD: No abuse of discretion in admitting testimony.

Doe v. Johnston, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Relevance

Patient acquired HIV from post-surgical blood transfusion and sued for lack of informed consent. At trial, patient also contended that transfusion was unnecessary, because surgery notes established a lower-than-average loss of blood during surgery and no post-operative event that required a transfusion. Defense experts supported the wisdom of a transfusion due to declining hematocrit and hemoglobin levels, and defendant presented photographic depictions of the type of surgery performed on patient. Plaintiff objected that the photographs were gruesome and prejudicial.

HELD: No abuse of discretion in admitting the photographs.

Springer v. Weeks & Leo Co., _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

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Relevance

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, district court admitted medical evidence about plaintiff's condition and its connection to her employment and letter by employer's attorney to Springer's attorney six days after termination, in which counsel for the employer said:

> [I]f Mary now believes her injury was not caused by her job, the company would be willing to review this situation. Of course, she would have to return the money she's received from the insurance company.

HELD: Because employer claimed that its discharge of Springer occurred due to her misrepresentations as to cause of her injury, the medical testimony was admissible. Because counsel's letter was written before "there was . . . litigation or controversy between the parties," it did not constitute an inadmissible offer of compromise under Rule of Evidence 408.

The court also found no abuse of discretion in admitting evidence of the settlement of Springer's workers' compensation claim, the amounts paid, and the filings by defendant with the Industrial Commissioner. They were relevant to the employer's motive and intent and, as to the amount of the settlement, were responsive to the employer's claim that it discharged her because she misrepresented her injury.

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Relevance

Defendant leased scaffolding to plaintiff's employer for use on a construction site. Defendant supplied a frame by one manufacturer and planks by another, so there was not a secure fit. Defendant adduced evidence that an inspection by plaintiff prior to using the scaffolding would have disclosed the incompatibility and resulting risk of injury.

HELD: District court's refusal to permit plaintiff to introduce similar scaffolding parts or photographs of same as evidence, or to permit jury view of a scaffolding assembly, was not an abuse of discretion.

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Doe v. Johnston, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Subsequent Remedial Measure

Patient acquired HIV from post-surgical blood transfusion in 1985. Patient did not discover that he had AIDS until 1987. At the time of the surgery, defendant surgeon was not advising patients of the risk of acquiring AIDS from blood transfusions or of the option of autologous transfusions. Before anyone knew that patient had acquired AIDS from the blood transfusion in 1985, and for reasons totally unrelated to this particular patient or his particular surgical procedure or post-operative course of treat-

ment, surgeon began to advise patients of the risk and the alternative.

HELD: District court properly excluded surgeon's change in his informed-risk procedures as a subsequent remedial measure. Rule of Evidence 407 provides:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

"Event" refers to the conduct giving rise to the claim of negligence, not the plaintiff's discovery of injury.

> [T]he policy behind the rule . . . is to encourage people to take steps to increase public safety. . . . [It] would not be served if evidence of defendants' changed behavior could be used to prove liability just because defendant was unaware that any injury or accident had occurred. . . . [It] should apply not only when the safety measures are taken in reaction to an accident, but also when they are taken merely upon discovery that change is needed.

Citing Petree v. Victor Fluid Power Inc., 831 F.2d 1191 (3rd Cir. 1987).

COMMENT: Court opines that Rule 407 and particularly its commentary about "accidents and repairs . . . seems to us poorly suited to cases involving medical treatment," and reserves the question of whether this holding will apply to cases outside medical malpractice. Introductory remarks in this division of the opinion suggest that the court would not apply Johnston in product liability cases to changes made after manufacture but before the accident.

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GOVERNMENTAL

Scheckel v. Jackson County, 467 N.W.2d 286 (Iowa App. 1991)

Contract

Plaintiff submitted bid for public road improvement. County awarded contract to another bidder. Plaintiff sued for

breach of contract, contending that his conversation with county engineer in which engineer informed him that his bid was the lowest received gave rise to a contract.

HELD: District court properly granted County summary judgment. "Those that enter into business transactions with a municipality are presumed to know the statutory requirements that the municipality must follow in order to make the transaction a legally binding one." County must jump through several procedural hoops, some of which involve consultations with DOT and the last of which involves formal action by the board of supervisors, before it can execute a contract for construction work. None of this had occurred with plaintiff. Engineer did not have authority to make an oral contract that would be binding on the county.

Connolly v. Dallas County, Iowa, 465 N.W.2d 875 (Iowa 1991)

Immunity

Dallas County appealed from a judgment imposing liability for flood damage incurred by Connollys, when County removed an old bridge abutment and widened the channel of the creek. HELD: County was under no duty to guard against flooding, if flooding of crops in fact was caused by removing old abutments. COMMENT: County could be liable under a "taking" theory.

Phillips v. City of Waukee, 467 N.W.2d 218 (Iowa 1991)

Immunity

At two-vehicle intersection accident, south-bound plaintiff encountered no signs and west-bound defendant violated his yield sign. Plaintiff sued municipality, claiming negligent "maintenance" of signage.

HELD: "Maintenance" exception to immunity granted by section 668.10(1) applies only to municipality's failure to preserve or care for signs that it installed. Plaintiff's claim attacks signage decisions. As such, plaintiff must prove that signs misled one of the motorists.

Plaintiff made two "misleading signage" arguments. First, the intersection was confusing because north-bound and east-bound traffic had to stop, west-bound traffic had to yield, and south-bound traffic was unregulated. Second, the west-bound defendant was not alerted to his duty to yield by a "yield ahead" sign or by a yield sign of size and distance that complied with DOT recommendations. Both complaints go to sufficiency of signage, which is immunized by section 668.10(1). Also, defendant's

testimony established his thorough familiarity with intersection, which eliminates possibility of having been misled.

Section 668.10(1)'s grant of immunity does not violate equal protection or due process.

Menke Hardware, Inc. v. City of Carroll, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Immunity

Section 613A.4(4) retains municipal immunity for "[a]ny claim against a municipality as to which the municipality is immune from liability by the provisions of any other statute." Section 364.16 permits a municipal fire department to answer calls outside the City's corporate limits and provides: "The City shall have the same governmental immunity outside its corporate limits when providing fire protection as when operating within the corporate limits." Plaintiff sued City of Carroll for the negligence of its fire department in allowing a fire that it extinguished outside Carroll's city limits to rekindle and destroy plaintiff's property.

HELD: Section 364.16 does not render a city immune from liability for all fire protection activity outside the city's corporate limits. Summary judgment in favor of City was error.

Keller v. State, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Immunity

On August 21, 1985, OSHA inspectors were on the premises of plaintiff's employer to discharge the Department of Employment Services' statutory duty to provide "on-site" consultative services to employers." Plaintiff's employer had directed plaintiff to conduct some spray painting. Before he did so, the inspectors happened on the scene and examined the materials, written information about them, the immediate work environment, and the mask plaintiff intended to wear. Plaintiff adduced evidence that the mask was not effective against inhalation of toxic vapors produced by the paints he was directed to spray. Plaintiff also adduced evidence that effective masks were available at the work site. Plaintiff also adduced substantial evidence that the inspectors gave affirmative approval directly to plaintiff of his use of the ineffective mask.

HELD: "Assuming that plaintiff was within a class of persons for whose benefit [the inspectors] were required to act . . ., these statutes and regulations did not impose a duty to instruct, warrant, or supervise plaintiff." The statues and regulations imposed only "the obligation to review the employer's

safety and health program within the scope of the employer's request and provided advice on modifications or additions to make the program more effective." If in discharging this obligation the inspector identifies a hazard, "their obligation is to assist the employer in developing a plan to correct the hazard, affording a reasonable period of time to accomplish that result. It is not the obligation of these [inspectors] to act directly to alleviate work site hazards contemporaneously with the discovery of same."

Plaintiff's alternative claim that the inspectors breached a duty voluntarily assumed when they affirmatively misadvised him, is barred by the misrepresentation exception to tort liability in § 25A.14(4).

Callahan v. State, 464 N.W.2d 268 (Iowa 1990)

Limitations of Actions

A four-year-old child was sexually molested while at the Iowa School for Deaf in 1981. Mother of the child discovered sexual abuse when child underwent extensive counseling in 1988. The mother immediately filed a claim under the Torts Claim Act. State raised two-year limitation under section 25A.13 by motion for summary judgment. Mother urged the discovery rule.

HELD: Claim against State under 25A does not accrue until the plaintiff knows or in exercise of reasonable care, should have known both the fact of the injury and its cause. It must be mother's knowledge of the incident, rather than the minor child's knowledge, that controls.

Bensley v. State, 468 N.W.2d 444 (Iowa 1991)

Statute of Limitations

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Bensley, Jacqueline Feltes, and Sutter died in an automobile accident on February 4, 1983. Their estates filed claims with the state appeal board on June 28, 1984, for negligent maintenance of a highway. One day later, the estates sued the state in district court. The appeal board notified the Bensley and Sutter estates (but not the Feltes estate) on November 26, 1984, that their claims were denied.

District court dismissed the three estates' action for lack of subject matter jurisdiction - because plaintiffs had not exhausted their administrative remedies, see Swanger v. State, 445 N.W.2d 344 (Iowa 1989) - on March 9, 1987. About 60 days later, the estates sued the state again. The state moved for summary

judgment on statute of limitations grounds, which was granted. The estates appeal from the summary judgment entered in this second action.

Section 25A.13 provides that a tort claim against the state must be filed with the appeal board within two years. This section also extends by "six months from the date of mailing of notice to the claimant by the state appeal board as to the final disposition of the claim or from the date of withdrawal of the claim the time to begin suit in civil court." Section 25A.13 then provides:

> If a claim is made under any other law of this state and a determination is made by a state agency or court that this chapter provides the exclusive remedy for the claim, the time to make a claim and to begin suit under this chapter shall be extended for a period of six months from the date of the court order making such determination by a state agency, the time to make the claim and to begin the suit under this chapter would otherwise expire before the end of such period.

Plaintiffs concede that they commenced their second suit more than two years after the accrual of their claims, and the Bensley and Sutter estates concede that their second suit was not commenced within six months of the appeal board's mailing of notice of final disposition. Instead, plaintiffs assert that Iowa law changed by the Court's opinion in Feltes v. State, 385 N.W.2d 544 (Iowa 1986) (plaintiff was Ronald Feltes, the husband of Jacqueline Feltes, whose estate is one of the appellants in the current case). In Feltes, plaintiff sued the state before receiving a denial of his claim from the appeal board and before six months had elapsed from filing the claim. Plaintiff resisted the state's motion to dismiss by suggesting that the district court simply defer action until after the appeal board denied his claim. The Supreme Court rejected that argument. Plaintiffs assert that Feltes changed Iowa law, thus triggering the second paragraph of section 25A.13, as provided above. Thus, when they were notified by the district court dismissal of their first lawsuit of this change in the law, section 25A.13 extended by six months from that dismissal the statute of limitations for filing their claims in district court, thus making their second suit timely.

HELD: Feltes did not constitute a change in Iowa law. Iowa law had been consistent with Feltes at least since Lloyd v. State, 251 N.W.2d 551 (Iowa 1977), if not earlier.

The estate of Jacqueline Feltes never received notice of the appeal board's denial of the estate's claim on November 26, 1984, because the notice was sent to the attorney representing Ronald Feltes before the appeal board on Ronald's claim. Ronald

was not the administrator of Jacqueline's estate and another attorney was representing the estate, so the state cannot even establish substantial compliance with the requirement that the state appeal board notify the claimant of final disposition. In other words, the six-month tolling period has never started, and the action filed on May 15, 1987, by the estate of Jacqueline Feltes was not barred by the statute of limitations.

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

Unlawful Disbursement of Public Funds

Hoefer served for years as insurance agent for Washington National, who provided health benefits insurance for the employees of the Sioux City School District. In 1983, the district sought competitive bids in an effort to reduce premium costs, and ultimately awarded the contract to Wisconsin Education Association Insurance Trust (WEAIT).

"Hoefer's loss of this business prompted a flurry of litigation over WEAIT's authority to furnish health coverage in this state." Eventually, the Supreme Court held that school districts were prohibited by section 509A.6 from contracting for health coverage with unregulated entities like WEAIT. See Sioux City Community School District v. Iowa State Board, 402 N.W.2d 739 (Iowa 1987).

"Armed with these decisions, Hoefer proceeded to sue nearly everyone involved in the fateful decision to contract with WEAIT." Hoefer sued WEAIT and the teacher's union on theories of fraud, conspiracy, and tortious interference with prospective business relations, his action proceeds primarily from the allegation that WEAIT misrepresented its status and the district's legal ability to contract with WEAIT. Hoefer sued the school district and individual school board members for fraud, promissory estoppel, tortious interference with prospective business advantage, and unlawful disbursement of public funds. This second action focuses primarily on the district's and the board members' failure to discover the flaw in WEAIT's status.

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District court sustained all defendants' motions for summary judgment. Hoefer appealed.

Hoefer's claim against the individual defendants for unlawful disbursement of public funds fails because of a lack of evidence that the allegedly illegal contract was "actuated by fraud, bad faith, or personal profit."

INDEMNITY

Thornton v. Guthrie County Rural Elec. Co-op, 467 N.W.2d 574 (Iowa 1991)

Employee of electrical construction contractor was injured when he came into contact with an electric line that had not been "de-energized." Employee sued utility, who cross-petitioned against contractor for indemnity pursuant to written contract. At trial, utility admitted its own negligence and proximate cause, jury found contractor to be negligent and found proximate cause. District court did not determine whether or not utility was entitled to indemnity because court held preliminarily on motion for judgment n.o.v. that contractor was not negligent as a matter of law.

After reversing the district court's ruling on judgment n.o.v., Court proceeded to determine that utility was entitled to contractual indemnity. Contract between utility and contractor included indemnity provision that applied "regardless of whether or not [liability] is caused in part by a party indemnified hereunder." General rule disfavoring contract indemnifying one from effect of own negligence is overridden by "clear and unequivocal" language. Fact that previous contract between contractor and utility did not contain such specific language was irrelevant, since second contract purported to amend first contract.

Stalter v. Iowa Resources, Inc., 467 N.W.2d 586 (Iowa App. 1991)

Railroad constructed spur siding track under Iowa Power electric transmission line. Railroad granted Iowa Power an easement. Railroad conveyed right-of-way to Heartland, who leased right-of-way to Iowa Interstate.

Plaintiff was electrocuted while working on railroad car located underneath Iowa Power's lines. Iowa Interstate had responsibility for railroad car. Plaintiff sued Iowa Power and Iowa Interstate (but not Heartland). Iowa Power cross-claimed against Iowa Interstate and cross-petitioned against Heartland and asserted negligence theories against both. Heartland counter-claimed for indemnity against Iowa Power.

The indemnity claim was severed. Before plaintiff's case was submitted to the jury, Iowa Power dismissed its cross-petition against Heartland and plaintiffs "settled all their claims with the defendants."

Indemnity case was then tried, and district court entered judgment in favor of Iowa Power on Heartland's indemnity claim. Heartland and Iowa Interstate appealed.

HELD: Iowa Interstate's appeal must be dismissed. It has never asserted a claim against Iowa Power for indemnity. Heartland cannot prevail in its claim for indemnity because it cannot prove liability to plaintiff. Plaintiff never sued Heartland. To the extent that Heartland contributed to the settlement with plaintiff, it was not compulsory and cannot create a claim for indemnity.

Stalter v. Iowa Resources, Inc., 468 N.W.2d 796 (Iowa 1991)

Railroad constructed spur siding track under Iowa Power electric transmission line. Railroad granted Iowa Power an easement. Railroad conveyed right-of-way to Heartland, who leased right-of-way to Iowa Interstate.

Plaintiff was electrocuted while working on railroad car located underneath Iowa Power's lines. Iowa Interstate had responsibility for railroad car. Plaintiff sued Iowa Power and Iowa Interstate. Iowa Power cross-petitioned against Railroad and Heartland and cross-claimed against Iowa Interstate for contribution and indemnity. Iowa Power contended that construction of the spur reduced clearance between the ground and its lines below what was required by safety standards.

Railroad moved for summary judgment. Iowa Power contended it was entitled to indemnity from Railroad because construction of the spur interfered with Iowa Power's easement and thus breached a duty of care, owed to Iowa Power by Railroad. District court sustained Railroad's motion for summary judgment.

HELD: District court properly dismissed Iowa Power's indemnity claim. Iowa Power failed to establish the existence of an easement at the time Railroad constructed the spur.

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Allied Mutual Insurance Co. v. State, 473 N.W.2d 24 (Iowa 1991)

State employee Lund was a passenger in a state automobile driven by Smith when it collided with vehicle driven by Sailor. Lund sued Sailor. Sailor's insurer, Allied, settled with Lund. Allied then sued State and Smith for contribution and indemnity. State and Smith moved for summary judgment. District court sustained motion as to both defendants and as against all Allied's claims.

HELD: Allied's indemnity claim against State fails as a matter of law, because State's vicarious liability as owner of vehicle for Smith's conduct rests on a duty no higher or greater than the duty owed by Smith. Even if Smith owed a duty of care, violation of it would not give rise to a claim by another tortfeasor for indemnity.

Central Life Insurance Company v. Aetna Casualty and Surety Company, 466 N.W.2d 257 (Iowa 1991)

Appraisal

Central Life Insurance Company (Central) was insured under a policy issued by Aetna Casualty and Surety Company (Aetna). After a fire damaged Central's buildings, Central invoked an appraisal process under a policy provision by which each party would chose a "disinterested" appraiser, who would select an umpire. The two parties entered into an appraisal agreement. Central offered its appraiser a fee contingent on the amount of its award, an arrangement initially unknown to Aetna. Umpire selected Central's appraiser's figure. Aetna refused to pay the ultimate award, claiming that it was excessive. After Central commenced an action to enforce the umpire's award, Aetna discovered the contingent fee.

HELD: The contingent fee offered to Central's appraiser made him an interested party in violation of the policy provision. Although appraisers may act as advocates for their parties, the intent of the appraisal procedure is undercut if an appraiser has a pecuniary interest in the outcome.

Watson v. National Surety Corp., 468 N.W.2d 448 (Iowa 1991)

Cooperation Clause

National Surety issued fire insurance policy to Watsons for their bowling alley. After total-loss fire, insurer investigated and tape-recorded interviews with Watsons. Watsons' statements during these interviews were not given under oath. Watsons then submitted a sworn proof of loss. Insurer thereafter and repeatedly requested in writing that Watsons submit to questioning under oath.

As required by section 515.138, Code of Iowa, National Surety's policy provides as a condition to claiming coverage for fire loss that the insured permit the insurer "to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed." Watsons refused to give further interviews, even after insurer warned that continued refusal would be treated as a breach of the contract, and supplied only affidavits to the effect that statements made in the previous interviews were true and correct.

Insurer denied claims and Watsons commenced a declaratory judgment action. During trial, Watsons offered to submit to questioning under oath if the court determined it to be necessary. District court determined on agreed facts that Watsons' refusal to submit to questioning under oath was a material breach of a condition of coverage.

HELD: Watsons did not substantially comply with the condition. Case law from other jurisdictions uniformly rejects use of initial, unsworn interviews as substantial compliance with this standard policy condition. Watsons' offer of affidavits in an effort to turn earlier interviews into sworn statements does not raise those previous interviews to a level of compliance. "[T]here is no indication that the insurer intended these preliminary interviews to be a substitute for questions under oath." Also, the condition does not limit the insurer's right to a single interview.

Watsons' offer at the time of trial to submit to examination under oath if court concluded that previous interviews did not substantially comply with condition were too late.

American Guarantee & Liability Insurance Co. v. Chandler Manufacturing Co., 467 N.W.2d 226 (Iowa 1991)

Cooperation Clause

Chandler and its distributor were sued in Webster County in a product-liability case in 1983. Chandler had gone out of business in 1982 and filed bankruptcy in 1984. Chandler did not notify American, who insured Chandler for the alleged liability, of the accident or the resulting suit. American learned of the suit only because the distributor added a cross-claim against Chandler and sent a copy to American. American retained defense counsel and notified Chandler's president, an Illinois resident, of its reservation of rights.

American sent numerous letters to Chandler's president in which it requested Chandler's cooperation and asked him to contact the Fort Dodge lawyer retained by American to defend Chandler. Insurance defense lawyer also corresponded with Chandler's president. He did not respond to any of these letters, except to call the defense lawyer once and provide oral answers to interrogatories. When the interrogatory answers were sent to him for his signature, he never returned them.

Two weeks before trial, American hand-delivered a letter to him, advising him of the trial and asking him to cooperate. Chandler did not respond or appear at trial. Plaintiff obtained a judgment against Chandler and the distributor, and the distributor obtained a judgment against Chandler for indemnification.

American commenced a declaratory judgment action. It appears that plaintiff and the distributor actively defended the declaratory judgment proceeding. District court found that American had "failed to use reasonable diligence in seeking Chandler's cooperation."

HELD: "Although this action seeks declaratory relief, its true nature is one of a judgment creditor seeking recovery against an insurer who insured the debtor for liability. . . . Therefore, . . . American had the burden of going forward . . . on the issue of Chandler's non-cooperation."

Inherent in the cooperation clause is a reciprocal obligation of the insurer to "use reasonable diligence in obtaining the insured's cooperation." An insurer seeking to deny coverage for violation of the cooperation clause must prove nevertheless (1) it exercised reasonable diligence, and (2) the insured failed to cooperate. "American failed to use reasonable diligence. . . . American was more concerned with making a paper trail to document [Chandler's] non-cooperation than in securing [its] cooperation and defending the lawsuit."

COMMENT: This opinion is extremely hostile toward American. It refers to the insurance defense lawyer as "American's lawyer." It criticizes American's letter to Chandler's president two weeks before trial because, although it notified him of the trial date and urged him to cooperate, it did not expressly request that Chandler "attend the trial." It noted that American's Kansas City office "merely corresponded" with Chandler, and apparently found some fault with American's request that Chandler cooperate with a lawyer in Fort Dodge when American knew that Chandler's president resided in Illinois. It noted that American never attempted to take a statement or a deposition from Chandler's president.

The lesson to be learned by liability insurers is to use the telephone and the nearest claims office, and conceivably even a proximate defense counsel (presumably in addition to "in-forum" counsel), in an effort to secure the insured's cooperation.

Q

Acceptance Insurance Co. v. United States Fire Insurance Co., 471 N.W.2d 791 (Iowa 1991)

Costs/Interest

Acceptance issued a liability insurance policy to Contemporary Industries in the amount of $300,000. The policy provided that Acceptance would pay

> all costs taxed against the insured in any such suit, [and] all interest accruing after entry of judgment until

> [Acceptance] had paid, tendered, or deposited in court such part of such judgment as does not exceed the limit of [Acceptance's] liability.

United States Fire issued an umbrella or excess insurance policy to Contemporary, which policy provided $10 million of coverage for liability in excess of $300,000. U.S. Fire's policy provided:

> With respect to any occurrence covered by the terms and conditions of this policy, but not covered . . . by any other underlying insurance collectible by the insured, [U.S. Fire] shall
>
> . . . .
>
> (c) pay . . . all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until a company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon.

Contemporary was sued for damages, the liability for which was covered under both insurance policies. After trial, plaintiff obtained a verdict and judgment against Contemporary in the amount of $1,375,000, plus costs and interest. Acceptance and U.S. Fire agreed on apportionment of the actual verdict between the policies, but could not agree on responsibility for payment of court costs and post-judgment interest. Acceptance paid both amounts with U.S. Fire's consent and commenced a declaratory judgment action to establish U.S. Fire's obligation, if any.

HELD: Acceptance's policy establishes without ambiguity that it shall pay all court costs and all post-judgment interest for which Contemporary is liable. U.S. Fire's policy establishes without ambiguity that it is responsible for such costs only when they are not covered by any other underlying insurance collectible by the insured. Whether as a matter of policy interpretation, or as a matter of equity, Acceptance is responsible for these payments.

Q

Weber v. IMT Insurance Company, 462 N.W.2d 283 (Iowa 1990)

Coverage

Weber raised crops and hogs. He used the manure as fertilizer. For 15 years he transported the manure to his fields by operating his manure spreaders on a public road that ran alongside Newman's farm. After 15 years, Newman sued, claiming the

manure that dropped on the highway exuded sufficient odor to contaminate his sweet corn crop and render it unmarketable.

Weber tendered defense to IMT, who had issued a farmer's comprehensive liability policy and an umbrella policy. IMT declined to defend under either policy. Weber commenced a declaratory judgment action. After trial, district court found no duty to defend.

HELD: Although manure does not always fall within the definition of "waste material" as set forth in a pollution exclusion clause of a liability insurance policy, "the ordinary meaning of waste material includes hog manure spilled on a road," and the insurance company in this case was not required to defend a cause of action arising from such manure.

"Accidental" for the purpose of a liability policy means "an unexpected and unintended event." "Expected" denotes that "the actor knew or should have known that there was a substantial probability that certain consequences [would] result from his actions." Spillage of hog manure was not "sudden and accidental" when it had occurred on many past occasions.

Pollution exclusion, which excluded coverage of actions caused by waste material, "is not bizarre or oppressive, and does not eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction." Therefore, the doctrine of reasonable expectations does not compel the court to ignore the exclusion.

Umbrella policy's coverage is triggered by an occurrence, defined as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended . . . ." Damage to sweet corn crop caused by spillage of hog manure on a county road constitutes an occurrence. Damage was not intended, and a reasonably prudent person would not necessarily know that there was a substantial probability that such damage would result from spillage of hog manure on a road.

Q

North Iowa State Bank v. Allied Mutual Insurance Co., 471 N.W.2d 824 (Iowa 1991)

Coverage

Kloosters sued North Iowa State Bank for compensatory and punitive damages arising out of Bank's attachment and sale of Kloosters' swine herd. Kloosters asserted theories of wrongful attachment, conversion, disposition of collateral in other than a reasonably commercial manner, abuse of process, tortious interference with a business relationship, and violations of civil rights under 42 U.S.C. section 1983. After the jury's special verdicts, the district court entered judgment in favor of Kloosters

and against Bank on wrongful attachment, emotional distress damages under the civil rights violation, and punitive damages. On appeal, the Supreme Court held that Bank should have received a directed verdict on wrongful attachment, tortious interference, and the 1983 theories. The court affirmed the verdict of $145,000 in compensatory damages and $100,000 in punitive damages on its claim of disposition of collateral in other than a reasonably commercial manner. See Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987).

When Kloosters commenced their action, Bank tendered defense to Allied. Allied responded that it had coverage only for the tortious interference claim and provided an attorney to defend only that portion of Kloosters' action. Bank commenced a declaratory judgment action, which was tried shortly after issuance of Klooster. The district court ruled that Allied had coverage for all theories advanced by Kloosters except disposition of collateral in other than a reasonably commercial manner, and had a duty to defend all but that theory. Allied reimbursed Bank for its defense costs in accordance with the district court's ruling.

Bank then commenced this action for payment by Allied of the Klooster judgment, and for bad-faith. After trial, district court found for Allied and against Bank on all matters.

In Klooster, Supreme Court affirmed the verdict and judgment on Kloosters' claim for disposition of collateral in other than a reasonably commercial manner. This was the sole claim for which the district court found in the declaratory judgment action that Allied had no coverage. Bank argued, however, that since it had not been entitled to a directed verdict on the theories of conversion or abuse of process, Allied had coverage for both such claims.

In fact, Supreme Court reversed verdicts on the theories of conversion and abuse of process because of erroneous instructions. Because damages awardable on retrial under either theory were already included in the verdict that was being affirmed, the Supreme Court held that no retrial on Kloosters' claims under those theories was necessary. As a result, there was no judgment against Bank and in favor of Klooster on any claims that were covered.

A.Y. McDonald Industries, Inc. v. Insurance Co. of North America, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Coverage

McDonald's manufacturing process caused the dumping of lead as a component of brass residue on its foundry site from 1949 to October 31, 1983. In 1984, EPA commenced administrative proceedings against McDonald for violations of the Resource

Conservation and Recovery Act. Ultimately, EPA found violations, imposed a civil penalty, and required McDonald to submit and perform closure and postclosure plans that included groundwater monitoring systems.

McDonald sued its general liability, umbrella, and excess insurers from 1949 through 1986 to obtain coverage and to require a defense (payment of litigation expenses). The Federal District Court certified three questions to the Iowa Supreme Court:

> 1. Does the language "all sums which the insured shall become legally obligated to pay as damages because of . . . property damage" include coverage for amounts expended by plaintiff in order to comply with the EPA's decision and resulting consent order?
>
> 2. Is coverage for the same matters provided by policy language of the following two types?
>
> > (a) "To indemnify the insured for all sums which the insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of 'ultimate net loss' . . . ."
> >
> > (b) "The corporation hereby agrees to indemnify the insured against such ultimate net loss in excess of the insured's primary liability as the insured sustains by reason of liability, imposed upon the insured by law or assumed by the insured under contract, for damages because of personal injury or property damage to which this policy applies, caused by an occurrence anywhere in the world."
>
> 3. Did INA with coverage language as described in paragraph 1 above have a duty to defend McDonald during the EPA proceedings as a result of INA's policy language that INA "shall have the right and duty to defend any suit against the insured"? In other words, were the proceedings before the EPA a "suit"?

Q

QUESTIONS 1 & 2

Insurers contend that their obligation to pay "all sums" is limited by the word "damages." In other words, only those "sums" which the insured is obligated to pay "as damages" are

covered. The policy does not define "damages." HELD: "Damages" is ambiguous and must be interpreted to include government-mandated response or clean-up costs under environmental protection statutes. Injury to the environment from contamination by hazardous waste constitutes "property damage." Response costs for preventive measures required after pollution has occurred are covered; costs of preventive measures taken in advance of pollution are not. Record on certification does not permit allocation of the remedial measures required by the consent decree, but some of those costs may be covered because they constitute legally compelled expenses for the clean-up of existing pollution.

The civil penalty does not come within any reasonable reading of "damages," so there is no coverage for it.

QUESTION 3

HELD: "Suit" is not defined in the policy and is susceptible to more than one meaning. We define it to include "any attempt to gain an end by legal process." The EPA proceeding easily fits within that definition, so Insurance Company of North America had a duty to defend.

North Iowa State Bank v. Allied Mutual Insurance Co., 471 N.W.2d 824 (Iowa 1991)

First-Party Bad Faith

Kloosters sued North Iowa State Bank for compensatory and punitive damages arising out of Bank's attachment and sale of Kloosters' swine herd. Kloosters asserted theories of wrongful attachment, conversion, disposition of collateral in other than a reasonably commercial manner, abuse of process, tortious interference with a business relationship, and violations of civil rights under 42 U.S.C. section 1983. After the jury's special verdicts, the district court entered judgment in favor of Kloosters and against Bank on wrongful attachment, emotional distress damages under the civil rights violation, and punitive damages. On appeal, the Supreme Court held that Bank should have received a directed verdict on wrongful attachment, tortious interference, and the 1983 theories. The court affirmed the verdict of $145,000 in compensatory damages and $100,000 in punitive damages on its claim of disposition of collateral in other than a reasonably commercial manner. See Klooster v. North Iowa State Bank, 404 N.W.2d 564 (Iowa 1987).

When Kloosters commenced their action, Bank tendered defense to Allied. Allied responded that it had coverage only for the tortious interference claim and provided an attorney to defend only that portion of Kloosters' action. Bank commenced a declaratory judgment action, which was tried shortly after issuance of Klooster. The district court ruled that Allied had coverage for

all theories advanced by Kloosters except disposition of collateral in other than a reasonably commercial manner, and had a duty to defend all but that theory. Allied reimbursed Bank for its defense costs in accordance with the district court's ruling.

Bank then commenced this action for payment by Allied of the Klooster judgment, and for bad-faith. After trial, district court found for Allied and against Bank on all matters.

Bank's bad-faith claim asserted that Allied acted in bad faith and was stubbornly litigious by refusing to provide coverage or defense for the other Klooster claims. District court found that Allied's decision rested on issues that were fairly debatable and did not arise from a litigious attitude. Bank contended on appeal that district court erred by applying the "fairly debatable" test, which applies in a first-party bad faith case, to the issue of a liability insurer's duties to its insured when being sued by a third-party. The court disagreed:

> We do not find merit in the Bank's contention that the legal standards for third-party claims should be applied in this case based on the fact that liability, rather than casualty coverage of property, is involved. The fiduciary duty required of an insurer in a third-party claim arises only when the insurer is required to represent the insured's position against the third-party. In a first-party claim, as in this case, the insurer occupies the same arm's-length position in relation to an insured that it occupies when the insurer challenges an insured's coverage of casualty losses. Consequently, we hold that the trial court correct examined the fairly debatable issue in this first-party claim and applied the correct legal standards in deciding the Bank's bad-faith claim.

Substantial evidence supported district court's finding that issues raised by Bank's tender were fairly debateable.

Q

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 460 N.W.2d 858 (Iowa 1990)

First-Party Bad Faith

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer on the underinsured motorist provision. The jury returned a verdict for the estate in the amount of $223,000, and the court entered judgment against the insurer for its $100,000 policy limit. The estate then filed an action against her insurer, alleging it had acted in bad

faith in denying the estate's claim for uninsured motorist benefits. The district court dismissed the petition, holding that the earlier action on the policy precluded a separate suit for bad-faith failure to settle.

HELD: A successful action brought by an insured against its own insurance company for uninsured motorist benefits does not necessarily preclude the estate from thereafter suing the insurer for an alleged bad faith-failure to settle the claim. Preclusion will depend on whether the cases arose out of the same facts. On a motion to dismiss, district court cannot conclude as a matter of law that they did.

Kiner v. Reliance Insurance Co., 463 N.W.2d 9 (Iowa 1990)

First-Party Bad Faith

Employee who made workers' compensation claim and received benefits sued Reliance for bad faith after Reliance refused to pay for certain medications. Reliance was of the opinion that Kiner had developed a drug-dependency problem and wanted him to obtain an evaluation and assistance. District court found the jury's verdict of $550,000.00 in punitive damages to be excessive and ordered a new trial on all issues in the bad-faith claim. Kiner appealed and Reliance cross-appealed.

In rejecting Reliance's cross-appeal, the Court revised the two-part test of Dolan, 431 N.W.2d 790 (Iowa 1988) to require first-party bad-faith plaintiff to prove only that the insurer "knew or should have known" that there was no reasonable basis for denying payment. Dolan used "knew or acted in reckless disregard."

Dirks v. Farm Bureau Mutual Insurance Co., 465 N.W.2d 857 (Iowa 1991)

Q

First-Party Bad Faith

Dirks was injured in a car-motorcycle accident. He reported it to Farm Bureau, who advised that there was no coverage with Farm Bureau for his motorcycle. Although Farm Bureau insured Dirks' auto and truck and although both policies contained underinsured motorist provisions, Farm Bureau did not volunteer the possibility of underinsured motorist coverage. After settling the claim against the tortfeasor, Dirks' counsel demanded coverage from Farm Bureau under the underinsured motorist provisions.

HELD: Although Dirks' original notification constituted a claim for benefits under the underinsured motorist provisions of the Farm Bureau policies, Farm Bureau had a reasonable basis for denying claim at that time. Thereafter, and notwithstanding the

tortfeasor's settlement, Farm Bureau still had a reasonable basis for disputing the tortfeasor's liability, rendering Dirks' claim "fairly debatable."

Reuter v. State Farm Mutual Automobile Insurance Co., 469 N.W.2d 250 (Iowa 1991)

First-Party Bad Faith

Reuter suffered injuries in car accident involving uninsured driver. Reuter's insurer, State Farm, paid Reuter $3,000.00 for a release of his uninsured motorist claim and $2,250.00 in settlement of his collision claim. State Farm advised Reuter that its medical pay coverage would cover expenses for three years after the accident.

Toward the end of the three years, State Farm began to question, and eventually declined to pay, some of Reuter's chiropractic expenses. State Farm obtained the independent opinion of Professional Evaluation Services that certain of Reuter's expenses were not necessary. Ultimately, Reuter wound up suing State Farm for $556.00. Understandably, Reuter added a bad-faith claim.

As a result of Dolan, 431 N.W.2d 790 (Iowa 1988), and as modified by Kiner, 463 N.W.2d 9 (Iowa 1990), Iowa requires a first-party bad-faith plaintiff to show absence (1) of a reasonable basis for denying policy benefits, and (2) that the insurer knew or should have known that the denial was without a reasonable basis. In sustaining State Farm's motion for directed verdict on the bad-faith claim at the end of trial, district court concluded that unless it could direct a verdict in favor of plaintiff on his breach of contract claim (thus ruling that the insured was entitled to payment of insurance benefits as a matter of law), it must find that the issue of coverage or obligation to pay benefits was "fairly debatable as a matter of law." Several courts in other jurisdictions have reached the same conclusion.

The Iowa Supreme Court affirmed but took issue with the district court's view of the impact of Dolan and Kiner.

> We do not agree that the mere denial of a plaintiff's motion for a directed verdict automatically establishes that the issue "fairly debatable." The trial court should carefully review the facts and the particular circumstances in making its determination as to what is the precise issue or issues that are debatable.

Here, at least, plaintiff had failed to establish a lack of reasonable basis for refusing to pay his medical expense claim.

Reuter argued that State Farm had failed to investigate and evaluate properly his medical expense claim before it denied the claim.

> If an objectively reasonable basis for denial of a claim actually exists, the insurer, as a matter of law, cannot be held liable for bad faith. Thus, an insurer's intentional, reckless, or negligent failure to investigate or evaluate a claim is only an element by which the insured may prove that no lawful basis for refusal existed. The insurer's "sub-par" investigation cannot in and of itself sustain a tort action for bad faith. The lack of proper investigation and evaluation is significant in proving the crucial element of a bad-faith tort, namely knowledge by the insurer of the lack of a debatable reason for denial. Although subjective bad faith may be inferred from an insurer's flawed investigation, an improper investigation, standing alone, is not sufficient cause for recovery if the insurer in fact has an objectively reasonable basis for denying the claim.

Verne R. Houghton Insurance Agency, Inc. v. Orr Drywall Co., 470 N.W.2d 39 (Iowa 1991)

First-Party Bad Faith

State Auto insured Orr Drywall through policies purchased from Houghton Insurance Agency. Orr Drywall reported a motor vehicle loss to Houghton. Either Houghton failed properly to notify State Auto or State Auto failed properly to receive and administer such notice. The opinion suggests but does not document that this notice problem resulted in some delay in the adjustment of Orr Drywall's claim.

Q

After negotiations and mediation, an agreement was drafted that provided for payment by State Auto of $17,000.00, resolution of salvage rights, and a release by Orr Drywall of "any and all claims against State Auto . . . , known and unknown for damages to the insured vehicle." The mediator and Orr Drywall executed this agreement, but State Auto did not. Nevertheless, State Auto paid the $17,000.00 and, in return, Orr Drywall executed a "policyholder's release" by which Orr Drywall "acknowledge[d] that said sum is in full settlement and discharge of any and all amounts due to the undersigned under policy number CC552006 on account of a collision loss . . . ."

Two months later, Houghton Insurance Agency sued Orr Drywall to recover unpaid insurance premiums due on an account. Orr Drywall counterclaimed for breach of contract and breach of fiduciary duty for untimely delays in processing the vehicle-loss claim. Orr Drywall then filed a third-party petition against State Auto for bad-faith delay in processing the claim. District court dismissed Orr Drywall's claims against Houghton and State Auto "because it believed the mediation agreement and policyholder's release, when read together, barred these claims."

HELD: The mediation agreement cannot be merged into the policyholder's release, because its release language is broader than the release language of the policyholder's release. Impossible to hold as a matter of law that the policyholder's release, which limits its terms to "amounts due under the policy upon account of a collision loss" include claims relating to bad faith in the adjustment of the claim. Orr Drywall adduced evidence of "exchanges, negotiations and actions . . . which support Orr Drywall's contention that the parties intended to settle only the contract claim, not the tort claim." Whether Orr Drywall's tort claim is precluded is a matter of the parties' intent and must be determined, on this record, by the trier of fact.

Orr Drywall's alternative argument that the release of State Auto, regardless of its scope, cannot include a release of Houghton Insurance Agency is barred by Orr Drywall's stipulation in district court that Houghton's actions occurred in its capacity as agent of State Auto.

COMMENT: The court viewed the mediation agreement's language on release as much broader than the corresponding language in the policyholder's release. While there is very broad language in the mediation agreement in the paragraph describing State Auto's release of Orr Drywall, the previous paragraph covering Orr Drywall's release of State Auto is really quite similar to the policyholder's release language. In comparing the two agreements, the court quotes from the wrong paragraph of the mediation agreement.

Q

Kroblin Refrigerated Xpress, Inc. v. Iowa Insurance Guaranty Association, 461 N.W.2d 175 (Iowa 1990)

Guaranty Association

HELD: For the purposes of section 515B.2(3)(a), the term "resident" as applied to an insurance corporation refers to the sight of its principal place of business, regardless of its charter state or the number of states in which it conducts business.

Kalell v. Mutual Fire & Automobile Insurance Co., 471 N.W.2d 865 (Iowa 1991)

Homeowner's Coverage

Peterson attempted to remove a dead limb from a tree by attaching a rope to the limb and pulling it with his pickup. In the process, the limb struck plaintiff. She sued Peterson. Farm Bureau, who provided Peterson with homeowner's liability coverage, intervened and sought a declaratory ruling as to coverage. Farm Bureau's policy excludes from its personal liability and medical payments coverages "bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of a motor vehicle owned or operated by . . . any insured."

District court held that the "arising out of" language in the exclusion was ambiguous and overruled Farm Bureau's motion for summary judgment. Farm Bureau appealed with permission.

HELD: When "arising out of" is in a coverage clause, it is construed broadly. When "arising out of" is in an exclusion clause, general rules of instruction and interpretation require that it be construed narrowly.

> When two independent acts of negligence are alleged, one vehicle-related and one not vehicle-related, coverage is still provided under the homeowner's policy unless the vehicle-related negligence is the sole proximate cause of the injury. . . .
>
> Removal of a limb with a rope could be negligence without regard to whether a motor vehicle was used to pull the rope. . . . The use of a pickup to provide the force . . . does not excuse the insured from any negligence in his decision to remove the limb with the rope.

Q

COMMENT: Compare this to North Star Mutual Insurance Co. v. Holty, 402 N.W.2d 452 (Iowa 1987), which the court distinguishes because the auger "was an integral part of the motor vehicle."

First National Bank in Sioux City v. Watts, 462 N.W.2d 922 (Iowa 1990)

Loss Payable Clause

Watts entered into a motor vehicle installment contract and security agreement with Dealer. Dealer assigned the contract and debt to Bank. Farm and City Insurance Company issued Watts an insurance policy covering the automobile. Farm and City listed

Bank as a payee under the comprehensive and collision coverage. The policy provided the date of expiration of coverage and the manner of renewal. It also contained a loss payable clause stating: "Insurance as to the interest of the . . . [lienholders] . . . shall not be invalidated by any act of neglect of the . . . owner of the . . . automobile. . . . The company reserves the right to cancel such policy at any time as provided by its terms, but in such case the company shall notify the lienholder."

Watts failed to pay premium due upon the first renewal date, and the policy expired. Two days after the policy's expiration, the automobile was involved in a collision, causing extensive damage. Bank demanded payment from Farm and City, asserting that the expiration was caused by the neglect of the owner, such that the interest of the lienholder remained valid under the loss payable clause.

HELD: The language of the loss payable clause pertaining to "neglect of the owner" referred to breach of policy conditions. Failing to pay renewal premium was not a breach of a condition. Consequently, the Bank was not protected by that portion of the loss payable clause. Because the policy expired rather than being canceled, the insurer was not required to notify the lienholder of the termination. "Cancellation" is the "termination of a policy prior to the expiration of the policy period by act of one or all of the parties," while expiration is a lapse of the policy period. The notice provision for cancellation did not apply, and Bank's interest insurance did not continue.

Principal Casualty Ins. Co. v. Norwood, 463 N.W.2d 66 (Iowa 1990)

Subrogation

Principal provided insurance coverage for Norwood's automobile, which was involved in an accident. Principal paid Norwood $5,000.00 for property damage under the collision coverage, and timely claimed subrogation rights to that amount from Norwood's claim against the tortfeasor for personal injury and property damage (deductible on the collision coverage). Norwood settled with tortfeasor. When Norwood's attorney demanded reduction of Principal's subrogation by a pro-rata share of his contingent fee, Principal commenced this declaratory judgment action.

Q

Section 668.5(3) and (4) provide:

> 3. Contractual or statutory rights of persons not enumerated in section 668.2 for subrogation for losses recovered in proceedings pursuant to this chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemi-

> zation of the judgment or verdict returned under section 668.3(8) and according to the findings made pursuant to section 668.14(3), and such contractual or statutory subrogated persons shall be responsible for a pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.
>
> 4. Subrogation payment restrictions imposed pursuant to (3) apply to settlement recoveries, but only to the extent that the settlement was reasonable.

Supreme Court interpreted this statute just like it reads: to apply to settlements as well as judgments, such that Principal was responsible for its pro-rata share of Norwood's attorney's contingent fee, so long as the settlement is reasonable.

Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Third-Party Bad Faith

Bates and Van Baale drove vehicles that collided at an intersection. Bates at first was unsure of who had the green light, acknowledged to the investigating officer at the hospital that his light "may have been red," and later claimed that he had the green light. Van Baale and his passenger, Hedlund, insisted that Van Baale had the green light. The officer issued Bates a summons. Bates and Van Baale testified at the traffic trial, and Bates was acquitted.

Bates sued Van Baale. Allied hired counsel La Suer to defend Van Baale. At the time of trial, La Suer believed the case was defensible. A number of facts supported his conclusion. Van Baale and Hedlund both insisted that Van Baale had the green light. The police officer would testify about Bates' concession in the hospital. Bates' insurer had paid Van Baale's property damage claim and Hedlund's personal injury claim.

After trial had commenced, Hedlund told La Suer that he had been lying and that Van Baale had run a red light.

La Suer immediately advised the Allied adjuster, who authorized La Suer to spend up to the policy limits of $20,000.00 to settle. La Suer confronted Van Baale, who then admitted that he ran a red light. La Suer then negotiated a settlement for $15,000.00 without disclosing to Bates or his counsel what he had learned.

"By the next day La Suer had decided he should withdraw from the case." Bates' counsel also discovered the change in circumstances. A hearing was held, and the court permitted La Suer to withdraw subject to notifying Van Baale. Two days later, new defense counsel for Van Baale offered Allied's policy limits of $20,000.00, which eventually was accepted.

Bates then sued Allied, Van Baale, and La Suer for bad faith, unfair trade practices, fraud, and intentional infliction of emotional distress. Allied and La Suer moved for summary judgment, which was granted.

HELD: Bates is a third-party to the insurance contract, and has no bad-faith claim for Van Baale's liability insurer's failure or refusal to settle. Distinguishing between insureds, who have a contractual relationship with the insurer, and third-party claimants, who do not, does not violate equal protection.

Veach v. Farmers Insurance Company, 460 N.W.2d 845 (Iowa 1990)

Underinsured Motorist

While riding his motorcycle, plaintiff was struck by an underinsured motorist. Plaintiff collected $100,000.00 from the driver and the $25,000.00 limit on his own underinsured policy issued by defendant (plaintiff's damages were stipulated to be at least $175,000.00). The plaintiff also was an "insured person" under a policy issued to his mother by defendant. This policy had underinsured motorist coverage with a limit of $50,000. Both policies contain an exclusion clause:

> This coverage does not apply to bodily injury sustained by a person:
>
> . . . .
>
> 4. If the injured person was occupying a vehicle you do not own which is insured for this coverage under another policy.

Both policies also contained an "other insurance" clause:

> 5. If any applicable insurance other than this policy is issued to you by us . . . , the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

Defendant refused to make any payments under plaintiff's mother's policy and plaintiff sued. The district court held the exclusion invalid and the "other insurance" clause valid, and accordingly ordered defendant to pay an additional $25,000.00 to plaintiff (the

difference between the $25,000.00 received on plaintiff's policy and the $50,000.00 limit on mother's policy).

HELD: The exclusion clause is void as against public policy. The court noted the "crucial distinction" between this policy, with a "not-owned-but-insured" exclusion, and the one at issue in Kluiter v. State Farm Mutual Ins. Co., 417 N.W.2d 74 (Iowa 1987), which held an "owned-but-not-insured" exclusion valid. With a "not-owned-but-insured" clause an insured "often will not have control over the coverage of the vehicle in which he or she is riding. Coverage could be cut in half simply by moving from

> his mother's car to his motorcycle. . . .
>
> The average member of the consuming public would doubtlessly find it strange that by purchasing $25,000.00 of underinsured motorist coverage [plaintiff] lost $50,000.00 of underinsured motorist coverage provided under his mother's policy. Moreover, under such a clause, the insureds are often better covered than a vehicle with no underinsured motorist coverage than in one with the statutory minimum.

The insurer is not assisted by the fact that "not-owned-but-insured" clauses in the uninsured motorist context have been upheld. McClure v. Employers Mutual Casualty Co., 238 N.W.2d 321, 326-27 (Iowa 1976). The differing treatment is due to the difference in objectives between uninsured (to provide victims with minimum coverage) and underinsured coverage (to provide victims with full compensation).

The "other insurance" clause is totally inapplicable. It relates only to any other applicable insurance issued to the named insured, and does not apply to policies issued to other family members.

Q Plaintiff was entitled to recover $50,000.00 from defendant ($75,000.00 in total benefits from both policies, minus the $25,000.00 already received from defendant).

Hernandez v. Farmers Insurance Co., 460 N.W.2d 842 (Iowa 1990)

Underinsured Motorist

Plaintiff was injured in an auto collision while a passenger in a car driven by an underinsured motorist. The parties stipulated that after collecting the limits of the driver's liability insurance, plaintiff retained a personal injury claim in excess of $225,000. He sought to recover on his own underinsured motorist policy, with a limit of $25,000, and on similar provisions

contained in two policies issued to his mother, with limits of $100,000 each, under which he was an "insured person." Farmers, the issuer of all three policies, refused to pay the limits on all three policies because of an "other insurance" anti-stacking clause contained in each policy:

> If any applicable insurance other than this policy is issued to you by us . . ., the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

Farmers did pay $25,000 on plaintiff's policy and $75,000 on his mother's policies, reasoning that the "other insurance" clause limited plaintiff's total underinsurance recovery from Farmers to $100,000.

HELD: The "other insurance" anti-stacking clause contained in each policy applies only to other policies issued to the same named insured. Thus, Farmers' payment of $25,000 on plaintiff's policy has no impact on its obligations under the policies issued to his mother. Since plaintiff has not been fully compensated, enforcement of the "other insurance" anti-stacking clause contained in the mother's policies would frustrate the protection afforded insureds under section 516A.1.

Andresen v. Employer's Mutual Casualty Co., 461 N.W.2d 181 (Iowa 1990)

Underinsured Motorist

Bank employee was injured in collision while operating his car in the course of his employment. The other driver was at fault and underinsured. After recovering the limits of the other driver's automobile insurance policy and the underinsured motorist limits of his own automobile insurance policy, plaintiff then sued bank's insurer under the underinsured motorist coverage included in bank's commercial auto policy.

HELD: Under the language of the underinsured motorist endorsement in bank's commercial auto policy, the employee's auto was a "borrowed auto" and was covered. Vehicle is borrowed when someone other than the owner temporarily gains its use. Policy also provided that anyone occupying a covered auto would be an insured.

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 461 N.W.2d 291 (Iowa 1990)

Underinsured Motorist

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer for underinsured motorist coverage, all in one action. The estate settled with the driver's liability insurer before trial. The jury determined the damages that the estate was legally entitled to recover against the driver, and the court entered judgment against Farm Bureau for its underinsured motorist coverage limits, minus payments under "med pay."

The court held that the policy language "legally entitled to recover" in underinsured motorist coverage does not require a judgment against the underinsured motorist as a precondition to coverage.

The court also held that there was no error in permitting plaintiff to introduce evidence of

> the policy limits available under both the underinsured motorist coverage of [Farm Bureaus'] policy and [the underinsured driver's] liability policy. . . . Evidence of the insurance limits . . . was offered by the estate to prove its claim under the insurance contract. In order to recover, the estate necessarily must prove the existence of the insurance contract and its terms. Any direct claim against an insurer on a contract dispute necessarily involves introduction of the insurance policy and its terms.

The court lastly held that Farm Bureau could not deduct payments under its "med pay" clause, at least when adding those amounts to others recovered does not exceed the amount that the insured was determined to be "legally entitled to recover."

Q

March v. Pekin Insurance Company, 465 N.W.2d 852 (Iowa 1991)

Underinsured Motorist

The subrogation lien of section 85.22 does not extend to underinsured-motorist benefits received by the employee pursuant to a privately owned contract of insurance.

Handley v. Farm Bureau Mutual Insurance Co., 467 N.W.2d 247 (Iowa 1991)

Underinsured Motorist

Handley was killed in two-car accident. Her estate sued the owner-operator of the other vehicle and Handley's insurer, Farm Bureau. The estate's claims against Farm Bureau were for underinsured motorist coverage provided by Farm Bureau under two policies issued to Mr. and Mrs. Handley, and for first-party bad faith for Farm Bureau's failure to pay the benefits. Farm Bureau moved to sever the claims against it for separate trial.

HELD: District court abused its discretion in refusing to sever the claims against Farm Bureau. Although the claims against Farm Bureau are not premature, see Leuchtenmacher v. Farm Bureau, 461 N.W.2d 291 (Iowa 1990), and even though the tortfeasor has conceded liability, the admission of evidence of the Farm Bureau Insurance "likely . . . will cause the jury to return a larger verdict against [the tortfeasor] than it would have if it were unaware that insurance existed and the amounts thereof."

Sweet v. Allstate Insurance Co., 471 N.W.2d 794 (Iowa 1991)

Underinsured Motorist

Gregory Sweet was killed in an automobile accident involving an underinsured motorist. Allstate issued an insurance policy to Gregory's father Jaron. Allstate's underinsured motorist provisions applied to Gregory.

Mr. and Mrs. Sweet sought to recover from Allstate under the underinsured motorist coverage. Allstate paid Mr. and Mrs. Sweet $40,000.00 and received their joint execution of a release:

> In consideration of the payment of $40,000.00 by Allstate, . . . the undersigned hereby forever releases and discharges Allstate from any and all liability and from any and all contractual obligations whatsoever under the coverage designated above of policy number 10143453 issued to Jaron Sweet by Allstate and arising out of bodily injuries sustained by Gregory Scott Sweet due to an accident on or about the 17th day of June 1988.

The release was a form in which only the underlined portions were manually entered.

After this settlement, Mr. and Mrs. Sweet opened an estate. Jaron was appointed administrator. Mr. and Mrs. Sweet were Gregory's sole heirs, and his estate had no outstanding creditors. The estate then sued Allstate to recover additional benefits under the underinsured motorist coverage of the Allstate policy.

Allstate moved for summary judgment on the basis of the previous release. District court overruled the motion, holding that "only the personal representative of Gregory's estate had authority to release the wrongful death claim and attendant recovery under Allstate's underinsured motorist coverage." Allstate appealed with permission.

HELD: At least where there are no debts and all beneficiaries agree on division of estate property, beneficiaries have the power to settle estate claims. Accordingly, Mr. and Mrs. Sweet had the power to release any of Gregory's claims that survived his death under section 611.20.

Whether or not the release applies to those claims by Gregory which survived his death, however, is a question of fact that cannot be decided on motion for summary judgment. The release is drafted so that it reasonably could be interpreted to refer either to Mr. and Mrs. Sweet's individual claims or the claims they hold by virtue of being the sole beneficiaries of Gregory's estate. Fact that Iowa law does not permit Mr. or Mrs. Sweet to recover as individuals for loss of services or support as a result of Gregory's death (he was an adult), does not assist Allstate.

> [T]his is indeed a strong argument for interpreting the release as embracing the entire gamut of wrongful death damages. On the other hand, claims which in fact have no basis in law may nevertheless be asserted and settled.

Operative meaning of the release "is to be found in the transaction and its context," and is a question of fact.

Houselog v. Milwaukee Guardian Insurance, 473 N.W.2d 52 (Iowa 1991)

Underinsured Motorist

Milwaukee issued insurance to Houselog's parents with underinsured motorist coverage. The policy also included a $3,000.00 med-pay clause that provided for reduction of underinsured motorist liability for payments under med-pay.

Houselog and his parents sued Spechtenhauser for injuries suffered and damages incurred in a motor-vehicle accident. Spechtenhauser's insurer provided $100,000.00 limits. After trial,

district court entered judgment against Spechtenhauser for $103,443.00 plus interest at 10% from December 18, 1985, the date Houselogs commenced their action. Spechtenhauser's insurer paid $102,037.57 (policy limits plus interest that had accrued after the entry of judgment).

Houselogs sued Milwaukee on its underinsured motorist provisions. Milwaukee contended that it was not responsible for any interest that had accrued on Houselogs' judgment, before or after entry of judgment. Given the $3,000.00 med-pay credit, Milwaukee asserted it was liable only for $443.00, plus interest at 10% from the date of the commencement of the action against Milwaukee.

HELD: Milwaukee's underinsurance clause providing coverage for "damages" for and because of "bodily injury" includes interest on a judgment for damages against an underinsured tortfeasor. Since Spechtenhauser's insurer paid for the interest that had accrued from entry of judgment until exhaustion of its limits, Milwaukee was liable only for interest that accrued up to the date of the Spechtenhauser judgment. Milwaukee is responsible, however, for the accrual of pre-judgment interest on the amount of the Spechtenhauser judgment recoverable from Milwaukee, including the interest, from the commencement of Houselogs' action against Milwaukee.

Specher v. Iowa Insurance Guaranty Association, 465 N.W.2d 887 (Iowa 1991)

Uninsured Motorist

Specher was injured while riding on a motorcycle driven by Donavon. Specher received her $25,000.00 limits from State Farm for uninsured motorist coverage. Donovon was insured for $50,000 for personal injury liability by American Insurance Exchange (AIE). AIE became insolvent. Specher filed a claim with the Iowa Insurance Guaranty Association for the full $50,000 she would have received under the AIE policy. IGA claimed that it was entitled to offset the $25,000 Specher received from State Farm to avoid duplication of recovery under Section 515B.9.

HELD: Section 515B.9 means that accident victims must exhaust their uninsured motorist coverage before filing a claim with the IGA. Any payment by the victim's insurance may then be offset by the IGA.

Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Unfair Trade Practices

Bates and Van Baale drove vehicles that collided at an intersection. Bates at first was unsure of who had the green light, acknowledged to the investigating officer at the hospital that his light "may have been red," and later claimed that he had the green light. Van Baale and his passenger, Hedlund, insisted that Van Baale had the green light. The officer issued Bates a summons. Bates and Van Baale testified at the traffic trial, and Bates was acquitted.

Bates sued Van Baale. Allied hired counsel La Suer to defend Van Baale. At the time of trial, La Suer believed the case was defensible. A number of facts supported his conclusion. Van Baale and Hedlund both insisted that Van Baale had the green light. The police officer would testify about Bates' concession in the hospital. Bates' insurer had paid Van Baale's property damage claim and Hedlund's personal injury claim.

After trial had commenced, Hedlund told La Suer that he had been lying and that Van Baale had run a red light.

La Suer immediately advised the Allied adjuster, who authorized La Suer to spend up to the policy limits of $20,000.00 to settle. La Suer confronted Van Baale, who then admitted that he ran a red light. La Suer then negotiated a settlement for $15,000.00 without disclosing to Bates or his counsel what he had learned.

HELD: Committing one of the unfair insurance trade practices itemized in chapter 507B still does not generate a civil cause of action. See Seeman v. Liberty Mut. Ins. Co., 322 N.W.2d 35 (Iowa 1972). Seeman has not been affected by Iowa's adoption of comparative fault or by the legislative prohibition of insurers' abuse of comparative fault in settlement negotiations. See §668.9, Code of Iowa.

Q

JUDGMENTS

Bokhoven v. Klinker, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Court Costs

Jury found plaintiff 51% at fault, so he did not recover from defendant. Section 625.1 provides: "Costs shall be recovered

by the successful against the losing party." Section 625.3 provides:

> Where the party is successful as to a part of the party's demand, and fails as to part, . . . the court on rendering judgment may make an equitable apportionment of costs.

HELD: Plaintiff was not successful on his claim, so district court had no authority under section 625.3 to make an equitable apportionment of costs. Section 625.4, dealing with multiple parties, was not applicable because defendant's cross-petition for indemnity was rendered moot by a 51% verdict.

Meyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Court Costs

District court lacks authority to impose more than the statutory $150 per day for the costs of expert witnesses. District court has no authority to impose the prevailing party's cost of procuring a copy of a deposition paid for by the opposing party as court costs.

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Credit

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Q

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William. While William's and Mary's appeals were pending, Schwennen tendered a partial satisfaction of the judgment against them in order to stop the accrual of interest.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd

County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

Schwennen had already paid more in interest and principal than Mary's ultimate judgment. Schwennen moved for entry of judgment against Mary and in favor of Schwennen for this excess, plus interest. District court denied Schwennen's motion. Schwennen appealed.

HELD: As an exercise of inherent power, and in accordance with section 74 of the Restatement of Restitution, court had the power to enter judgment in favor of Schwennen for its excess payment and should have done so. Mary conceded the overpayment and "offered no reason why judgment should not have been entered other than that the Schwennens had not filed a separate suit. Requiring such a suit would be a waste of judicial resources and contrary to the meaning and spirit of the Restatement rule."

Interest did not begin to accrue until after Schwennen demanded return of its overpayment. For purposes of determining what interest rate to apply, Schwennen's motion shall be deemed to constitute the commencement of an action, thus entitling Schwennen to 10% annual interest from the date of the motion.

Allison-Bristow Community School District v. Iowa Civil Rights Commission, 461 N.W.2d 456 (Iowa 1990)

Execution

Rowland was awarded back pay and interest in a civil rights action against his employer. A judgment creditor (Willow Tree) then attempted to garnish the funds that were being held on behalf of Rowland. Rowland argued that the funds deposited for back pay and interest were exempt under section 642.21. HELD: Exemption for personal earnings applied to back pay, but not to interest.

Q

Arbie Mineral Feed v. Farm Bureau Mutual Insurance Company, 462 N.W.2d 677 (Iowa 1990)

Execution

Arbie obtained a judgment on a promissory note against James Elgin in "Action No. 1." Elgin and several others subsequently brought an unrelated action ("Action No. 2") against Farm Bureau to recover on a fire loss. While Action No. 2 was pending, Plaintiff Arbie instructed sheriff to levy upon any portion of the judgment in Action No. 2 which was allocated to Elgin, which the sheriff did. The parties in Action No. 2 entered into a settlement

with Elgin receiving nothing personally. Plaintiff sued all parties in Action No. 2, alleging fraud, negligence, and breach by Farm Bureau of its duty as a garnishee.

HELD: You can't levy upon a judgment before the judgment is entered. The property that is the subject of the levy does not exist until entry of judgment. Arbie could have protected itself by levying upon Elgin's cause of action instead.

Printen v. James, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Execution

A judgment debtor's motor vehicle is exempt from execution under section 627.6(9). Judgment creditor directed sheriff to levy on debtor's automobile, but only by noting the levy on its certificate of title, so that creditor would recover upon debtor's sale of automobile. HELD: Notation of lien on certificate of title presupposes that a valid lien exists. Debtor's car was not subject to levy.

Eagle Leasing v. Amandus, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Foreign Judgment

Car rental agency obtained default judgment in West Virginia against Iowa resident who rented vehicle from agency in West Virginia and then intentionally and maliciously damaged vehicle. Agency obtained jurisdiction over defendant in accordance with West Virginia's long-arm statute, which is similar in content to section 617.3. Defendant received notification of service of original notice on West Virginia's secretary of state by certified mail.

HELD: Court in West Virginia acquired personal jurisdiction over defendant by agency's compliance with long-arm statute. Under chapter 626B, judgment entered by court in West Virginia with personal jurisdiction is final, conclusive, and enforceable in Iowa.

Q

LoRange v. Rasmusson Construction Company, 464 N.W.2d 482 (Iowa App. 1990)

Garnishment

Plaintiff garnishor attempted to bring an ultra vires action on behalf of the debtor corporation to retrieve from the garnishee corporate funds which the corporate president had used to

pay a personal debt to the garnishee. Plaintiff argued that he had the power to bring the ultra vires action because, as garnishor, he stood in the place of the debtor corporation.

HELD: Garnishor could not assert an ultra vires claim on behalf of the debtor corporation to retrieve misused funds from the garnishee. If the garnishor had any power at all to bring such an action, it would have been appropriate against the officer rather than the garnishee.

Carson Grain & Implement v. Dirks, 460 N.W.2d 483 (Iowa App. 1990)

Interest

Dirks farmed two parcels of land. He orally contracted with Carson to provide weed control. Carson sprayed the two parcels, but not at the same time. Dirks claimed that failure to spray the parcels at the same time was a material breach of the contract and refused to pay Carson's bill.

Carson sued, and after trial, district court found that Dirks had breached the contract, that Carson's charges were fair and reasonable, and that Carson was entitled to its service charge as well as statutory interest.

HELD: Section 535.11(7) provides expressly that the finance charges authorized in sections 535.11(4) and 537.2202(2) and (3), supersedes and preempts section 535.3. Carson is not entitled to both, however. Judgment for statutory interest is reversed.

Veach v. Farmers Insurance Company, 460 N.W.2d 845 (Iowa 1990)

Interest

Q

Plaintiff sued to recover underinsured motorist benefits on a policy issued to his mother and under which she was an additional insured. HELD: The damages recoverable under this policy did not become fixed until after the action was commenced. Thus, interest is limited to the statutory 10% accruing from the date of the commencement of the action, not from the date of the accident.

Power Equipment, Inc. v. Tschiggfrie, 460 N.W.2d 861 (Iowa 1990)

Interest

Plaintiff sued to collect finance charges allegedly owed on the account of defendant. Defendant periodically purchased goods and services from plaintiff and customarily signed plaintiff's invoice that provided for interest on amounts due after 30 days. Defendant asserted that plaintiff did not have the right to assess finance charges, and further questioned plaintiff's right to compound the finance charges by assessing them against prior finance charges. The district court held that the compounding was improper, and therefore used section 535.11(8) to effect a forfeiture of plaintiff's right to collect any finance charges.

The Supreme Court reversed and remanded for additional fact finding. District court should determine whether or not the invoice signed by defendant constituted an agreement, under section 535.2(2), to pay a greater rate of interest than otherwise authorized by law. As a matter of law, however, compounding was improper because the invoice language did not specifically address it.

Macal v. Stinson, 468 N.W.2d 34 (Iowa 1991)

Interest

Macal sold farm to Stinson on contract that required down payment of 10% and balance at time of possession. Macal was unable to finance purchase and breached contract at time of possession date. Macal had intended to use proceeds to pay construction costs on a new home, so Macal had to secure a home-mortgage loan.

Macal sued Stinson for breach of contract and recovered the difference between contract price and fair market value of the property at time of breach, minus the down payment. Macal appealed from district court's refusal to allow recovery of interest paid by Macal on home mortgage that was necessitated by Stinson's breach.

HELD: Neither party "anticipated the drastic drop in farm values which precipitated the breach, nor its consequences." Macal's home-mortgage loan "is too remote to qualify as arising naturally from the breach." It was not foreseeable that Macal would have to borrow money at a higher rate if Stinson breached the contract.

COMMENT: Court initially noted that Macal received interest on money due from the date of breach at 5% and interest at 10% from the date of action. "To allow both statutory and actual interest for use of the same money at the same time would be duplicative and thus inimical to a fundamental canon of the law of damages." Court then proceeded to examine whether or not Macal was

entitled to recover the home-mortgage interest as an item of consequential damages, because that amount would have exceeded the interest on money due. If recoverable, Macal apparently would have been entitled to elect between them.

Cowan v. Flannery, 461 N.W.2d 155 (Iowa 1990)

Interest

Under chapter 668 cases, at least, interest to be awarded for "future damages" accrues only from the date of entry of judgment.

Jordan v. IDOT, 468 N.W.2d 827 (Iowa 1991)

Interest

Jordan owned and operated mobile-home dealership on Southeast 14th Street in Des Moines (which at that point is State Highway 169). IDOT commenced a road construction project along a portion of 14th Street where Jordan's business was located. In return for granting IDOT a temporary easement onto Jordan's property during the construction phase, Jordan secured IDOT's promise to reduce the planned median's height along the stretch of highway in front of Jordan's business, so that traffic turning left onto Jordan's business would not be impeded.

Before IDOT constructed the median, Jordan sold on installment contract to Jones. IDOT did not perform its promise to reduce the height of the median strip in front of the mobile-home business. Jones defaulted on the real estate contract, ostensibly because of IDOT's breach, and Jordan reacquired the property by forfeiture. Jordan then resold to another party for substantially less than Jones had paid. Jordan sued IDOT for breach of contract, and district court awarded Jordan $75,000.

Jordan's expert witness testified that he approximated a present-value of the Jones contract because Jordan gave Jones a preferential interest rate and did not require a down payment. With interest, the expert testified that the total amount due Jordan "rounds to $77,000." District court awarded $75,000.

HELD: "Although greater specificity would have aided this court in determining how the district court arrived at the amount of damages awarded, this failure is not critical given the nature of plaintiff's proof." Because Jordan waived its claim against IDOT for the "taking" of its property, it is appropriate to measure Jordan's damages by determining the effect on the value of

Jordan's property. Jordan is not entitled to interest on that amount, however. Jordan's right to interest is limited to pre-judgment interest.

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Interest

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William. While William's and Mary's appeals were pending, Schwennen tendered a partial satisfaction of the judgment against them in order to stop the accrual of interest.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

Schwennen had already paid more in interest and principal than Mary's ultimate judgment. Schwennen moved for entry of judgment against Mary and in favor of Schwennen for this excess, plus interest. District court denied Schwennen's motion. Schwennen appealed.

Q

HELD: As an exercise of inherent power, and in accordance with section 74 of the Restatement of Restitution, court had the power to enter judgment in favor of Schwennen for its excess payment and should have done so. Mary conceded the overpayment and "offered no reason why judgment should not have been entered other than that the Schwennens had not filed a separate suit. Requiring such a suit would be a waste of judicial resources and contrary to the meaning and spirit of the Restatement rule."

Interest did not begin to accrue until after Schwennen demanded return of its overpayment. For purposes of determining what interest rate to apply, Schwennen's motion shall be deemed to

constitute the commencement of an action, thus entitling Schwennen to 10% annual interest from the date of the motion.

Van Der Maaten v. Farmers Coop., 472 N.W.2d 283 (Iowa 1991)

Interest

When two cooperative associations proposed a merger, member Van Der Maaten objected, voted against it, and then demanded pursuant to section 499.66(3) the return of his interest. The statute does not provide the procedure or timing for such payment. In addition to providing the procedure, the court held that Van Der Maaten was entitled to 5% interest under section 535.2(1)(b) from the date of demand, which in this case was the filing of his petition to recover under section 499.66(3).

Houselog v. Milwaukee Guardian Insurance, 473 N.W.2d 52 (Iowa 1991)

Interest

Milwaukee issued insurance to Houselog's parents with underinsured motorist coverage. The policy also included a $3,000.00 med-pay clause that provided for reduction of underinsured motorist liability for payments under med-pay.

Houselog and his parents sued Spechtenhauser for injuries suffered and damages incurred in a motor-vehicle accident. Spechtenhauser's insurer provided $100,000.00 limits. After trial, district court entered judgment against Spechtenhauser for $103,443.00 plus interest at 10% from December 18, 1985, the date Houselogs commenced their action. Spechtenhauser's insurer paid $102,037.57 (policy limits plus interest that had accrued after the entry of judgment).

Houselogs sued Milwaukee on its underinsured motorist provisions. Milwaukee contended that it was not responsible for any interest that had accrued on Houselogs' judgment, before or after entry of judgment. Given the $3,000.00 med-pay credit, Milwaukee asserted it was liable only for $443.00, plus interest at 10% from the date of the commencement of the action against Milwaukee.

HELD: Milwaukee's underinsurance clause providing coverage for "damages" for and because of "bodily injury" includes interest on a judgment for damages against an underinsured tortfeasor. Since Spechtenhauser's insurer paid for the interest that had accrued from entry of judgment until exhaustion of its limits, Milwaukee was liable only for interest that accrued up to the date of the Spechtenhauser judgment. Milwaukee is responsible, however, for the accrual of pre-judgment interest on the amount of

the Spechtenhauser judgment recoverable from Milwaukee, including the interest, from the commencement of Houselogs' action against Milwaukee.

Kimm v. Kimm, 464 N.W.2d 468 (Iowa App. 1990)

Lien

In 1973, Porter Kimm, Harlan Kimm, and Harlan's wife, LaDonna Kimm, purchased a farm on contract as joint tenants with full rights of survivorship and not as tenants in common. In 1977, Harlan and LaDonna quit claimed their interest in the farm to their son, Charles. They also assigned their interest in the contract to Charles. In 1979, Porter Kimm died intestate. In the same year, GMAC obtained a judgment against Harlan and filed a lien against the property.

In 1982, Charles and the Porter Kimm Estate filed a petition to remove Harlan and LaDonna from the farm. A stipulated agreement was filed in 1985 concerning the litigation, and a decree provided that the property would be sold, with the proceeds to be distributed 25% to the Porter Kimm Estate, 37.5% to Charles and his wife, and 37.5% to LaDonna and her attorney. LaDonna also agreed to pay Charles for lost equipment out of her portion. In the meantime, two creditors obtained judgments against Harlan in 1984 and filed liens against the property.

In 1989, the farm was sold. The court entered a ruling concerning the distribution, awarding LaDonna's 37.5% to Harlan because the agreement distributing the proceeds to LaDonna rather than Harlan was a fraudulent conveyance. The court ordered that the three creditors would be paid first, then Charles would be paid for the loss of equipment. Charles appealed, contending that he had priority over the other three creditors based on the 1985 agreement. He claimed that the creditors' liens were invalid because Harlan was not the legal titleholder of the land at the time of their judgments.

HELD: The 1977 conveyance of the title to the land and interest in the contract to Charles was fraudulent, done to avoid Harlan's creditors. Harlan continued to make the payments. In Harlan's answer to Charles' petition to remove him from the land, he stated that he was the actual owner of the land. Further, Harlan had an equitable lien in the property of at least 37.5% after the agreement by which he would receive that percentage of the proceeds from the sale of the land. The liens of the judgment creditors attached to Harlan's interest in the land, and they had priority over Charles' claim.

Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 460 N.W.2d 858 (Iowa 1990)

Preclusion

Leuchtenmacher was killed in an auto collision. Her estate sued the other driver and her own insurer on the underinsured motorist provision. The jury returned a verdict for the estate in the amount of $223,000, and the court entered judgment against the insurer for its $100,000 policy limit. The estate then filed an action against her insurer, alleging it had acted in bad faith in denying the estate's claim for uninsured motorist benefits. The district court dismissed the petition, holding that the earlier action on the policy precluded a separate suit for bad-faith failure to settle.

HELD: A successful action brought by an insured against its own insurance company for uninsured motorist benefits does not necessarily preclude the estate from thereafter suing the insurer for an alleged bad faith-failure to settle the claim. Preclusion will depend on whether the cases arose out of the same facts. On a motion to dismiss, district court cannot conclude as a matter of law that they did.

Bagley v. Hughes A. Bagley Inc., 465 N.W.2d 551 (Iowa App. 1990)

Preclusion

In July of 1984 plaintiff filed a small claims action against defendant. The claim was for "money advanced to the corporation for purchase and improvement on automobile which was to be part of my wages and has not been turned over to me." The court ruled in favor of the defendant, because the plaintiff had not established the amount of back wages owed to him or whether those back wages would cover the amount of the car. In January of 1986, plaintiff filed an action in district court for unpaid wages. Defendant claims that this action is barred by res judicata.

HELD: Issue Preclusion. Although the issue to be litigated in the district court is the same as the issue in the small claims court, there are reasons for denying issue preclusion. Small claims courts are geared toward swift and inexpensive resolution. Procedures in small claims court may be "wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim." Claim Preclusion. The adjudication of a claim in small claims court can have a preclusive affect within the regular jurisdiction of the district court.

Crawford v. Hall, 464 N.W.2d 464 (Iowa App. 1990)

Remittitur

Judgment in Jefferson County was transcribed to Van Buren County. Plaintiff later consented to a remittitur, which was not transcribed. Defendant died, and his executor refused to pay the judgment from the estate, claiming that the failure to transcribe the remittitur prevented the attachment of the judgment lien on the land in Van Buren County. The district court entered a decree permitting plaintiff to execute on the land. Defendant appealed.

HELD: No transcription of the remittitur was required. The transcribed judgment was automatically reduced upon the filing of the remittitur in Jefferson County. Also, under Iowa Rule of Civil Procedure 250, the original judgment was reinstated when defendant appealed, therefore remittitur was of "no force and effect."

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Satisfaction

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William. While William's and Mary's appeals were pending, Schwennen tendered a partial satisfaction of the judgment against them in order to stop the accrual of interest.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

Schwennen had already paid more in interest and principal than Mary's ultimate judgment. Schwennen moved for entry of satisfaction of Mary's judgment. District court denied Schwennen's motion. Schwennen appealed.

HELD: Schwennen was entitled to entry of satisfaction of the judgment.

JURISDICTION

Newton Manufacturing Co. v. Biogenetics, Ltd., 461 N.W.2d 472, (Iowa App. 1990)

Newton Manufacturing brought an action against Biogenetics, an Illinois Corporation, for money due on several orders of gymbags. Margaret Featherstone was personally served at the Biogenetics office. Although Featherstone was not an officer or agent of Biogenetics, she had accepted service in the past. Default judgment was entered against Biogenetics. Biogenetics moved pursuant to rule 236, claiming that there was a jurisdictional defect and that this defect fell under one of the grounds upon which a default judgment can be set aside under this rule.

HELD: It was held that Biogenetics dealt extensively with an Iowa Corporation; it could have reasonably anticipated being hailed into an Iowa court without offending the traditional notions of fair play and substantial justice. Featherstone was a general agent of Biogenetics and, therefore, service of process complied with Iowa Rules of Civil Procedure.

LIMITATIONS OF ACTIONS

Q

Schulte v. Wageman, 465 N.W.2d 285 (Iowa 1991)

Mary and Thomas conceived a child. The child was born out of wedlock. Mary's parents entered into an agreement with Thomas in which Thomas was to pay them $5,500.00. In return, they would not institute a paternity action. Shortly before Todd turned 18, however, Mary instituted a paternity action against Thomas. The action was dismissed based on defendant's motion for summary judgment because the case was not brought within the two-year statute of limitations contained in former section 675.33, which was in effect when the child was born.

HELD: Since the statutory bar had been legislatively repealed, the action may proceed as though the statute of limitations had never existed.

Willow Tree Investments Inc. v. Wilhelm, 465 N.W.2d 849 (Iowa 1991)

The Eighth Circuit certified the following question to the Iowa Supreme Court:

> Do the periods of limitation or repose provided in Section 614.21 apply so as to preclude an action between mortgagor and mortgagee to foreclose a mortgage dated more than 20 years before the commencement of the action for foreclosure, where extension agreements concerning the underlying indebtedness were executed between the mortgagor and mortgagee, but were not recorded?

HELD: Yes.

Husker News Co. v. Mahaska State Bank, 460 N.W.2d 476 (Iowa 1990)

Commercial Paper

Plaintiff filed conversion action against bank, alleging that the bank improperly paid checks on a forged endorsement. The checks were payments from plaintiff's customers that were forged by an employee of plaintiff and deposited in that employee's personal account. The action was filed after the expiration of the 5-year limitation period for injuries to property provided by section 614.1(4), but the plaintiff claimed that the suit was timely because it was brought within 5 years from the date plaintiff discovered the forged endorsements.

The Supreme Court refused to apply the discovery rule to conversion actions brought under section 554.3419. The court relied on the overwhelming weight of authority from other jurisdictions and the uniformity and finality policies of the UCC in determining that the 5-year period commenced on the date the forged instruments were paid.

Q

Callahan v. State, 464 N.W.2d 268 (Iowa 1990)

Discovery Rule

A four-year-old child was sexually molested while at the Iowa School for Deaf in 1981. Mother of the child discovered sexual abuse when child underwent extensive counseling in 1988. The mother immediately filed a claim under the Torts Claim Act. State raised two-year limitation under section 25A.13 by motion for summary judgment. Mother urged the discovery rule.

HELD: Claim against State under 25A does not accrue until the plaintiff knows or in exercise of reasonable care, should have known both the fact of the injury and its cause. It must be mother's knowledge of the incident, rather than the minor child's knowledge, that controls.

Kiner v. Reliance Insurance Company, 463 N.W.2d 9 (Iowa 1990)

Slander

Workers' compensation insurer refused to make payments for insured's pain medication, stating on three occasions that the insured was addicted to the drugs. Only the last statement, that the plaintiff's addiction had not changed, was within the 2-year statute of limitations. HELD: The third statement could be found to be defamatory by itself and plaintiff's claim therefore was filed within the statute of limitations.

Schultze v. Landmark Hotel Corp., 463 N.W.2d 47 (Iowa 1990)

Wrongful Death

Plaintiff's decedent received medical care at hospital on May 27, 1987, as a result of a fall sustained at a hotel. She died on June 13. On September 8, plaintiff's counsel received hospital's medical records. Plaintiff sued hotel on June 30, 1988, and amended its petition on June 30, 1989, to add medical defendants and medical-malpractice claims against them.

Section 614.1, which provides the statute of limitations for medical malpractice, provides:

> Actions may be brought within the times herein limited . . . :
>
> . . .
>
> 9. Malpractice. Those founded on injuries to the person or wrongful death against any physician . . . or a hospital . . . , within two years after the on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence, the injury or death for which damages are sought.

Plaintiff did not commence its action against medical defendants within two years of decedent's death. Plaintiff urged that "injury" and "death" in section 614.1(9) had to be modified by

"personal" and "wrongful" respectively in order to effectuate the discovery rule.

HELD: Two-year statute begins to run with decedent's death.

NEGLIGENCE

Thornton v. Guthrie County Rural Elec. Co-op, 467 N.W.2d 574 (Iowa 1991)

Employee of electrical construction contractor was injured when he came into contact with an electric line that had not been "de-energized." Employee sued utility, who cross-petitioned against contractor for indemnity pursuant to written contract. At trial, utility admitted its own negligence and proximate cause, jury found contractor to be negligent and found proximate cause. District court did not determine whether or not utility was entitled to indemnity because court held preliminarily on motion for judgment n.o.v. that contractor was not negligent as a matter of law.

Contract between utility and contractor provided that utility was responsible for de-energizing lines and that contractor was to be working only with lines that were de-energized. Contract proceeded, however, to detail contractor's obligations to take precautions against electrocution. Plaintiff and utility adduced evidence that contractor took no such precautions.

HELD: Substantial evidence supported jury verdict that contractor was negligent. Contractual provision that no lines on which contractor was to be working were to be energized does not free contractor from duty of care.

Q

Meck v. Iowa Power & Light Co., 469 N.W.2d 274 (Iowa App. 1991)

Meck was employed as a millwright by APM, which had a labor and services contract with Iowa Power under which APM was to supply millwrights to perform maintenance at Iowa Power's plant. Contract between APM and Iowa Power provided that the millwrights were to perform under the direction/supervision of Iowa Power. Meck was injured in the course of his employment for APM while working at Iowa Power's plant, when a conveyor belt on which he was standing began to move.

Meck adduced evidence that Iowa Power had over four miles of belts at the site to transport coal to its generators. The

belts are operated from a remote control room that is not in visual contact with the belt on which Meck was standing. Iowa Power usually kept an employee on the floor to verify that such belts are clear before they are started. No such personnel was present at the time of Meck's accident. Meck also adduced substantial evidence that the warning horn in Meck's vicinity may have worked only intermittently and that Iowa Power knew or should have known of same. Another employee attempted to alert the control room of Meck's precarious situation before the belt was activated, but his radio did not work. Without disclosing the content of the instructions, the Court of Appeals held that Meck had adduced substantial evidence in support of his claim against Iowa Power for negligence, and that the jury instructions adequately instructed on Iowa Power's duty of care with respect to Meck.

Lanz v. Pearson, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Act of God

As a result of multiple-vehicle accident, defendants asserted affirmative defense of act of God. Jury could find that at time of accident, highway was icy and snow covered, with center line obscured and road surface slippery. Visibility was reduced by darkness, falling snow, and the snow kicked up by travelling vehicles. District court submitted act of God as an affirmative defense and jury found no fault on defendants.

HELD: Defendants did not adduce substantial evidence that the driving conditions could not have been anticipated or expected, which is the third element of act of God defense under Oats v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).

COMMENT: Court reaffirmed Renze, 418 N.W.2d at 641-42, which held that God is not a party under section 668.2 and therefore cannot be assigned percentages of fault for his/her acts, and that concluded that act-of-God defense may be used, therefore, only as a particularization of the sole proximate cause argument.

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Comparative Fault

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

By instructions, district court disclosed in instructions that Mary's damages were $85,000 and, without disclosing the amount, that Mary had "resolved her claim" against Floyd County. Mary objected to these disclosures and appealed from the resulting judgment on those grounds.

HELD: Although Mary's suit arose before Chapter 668's enactment, its provisions with respect to disclosure of the impact of percentages and disclosure of Floyd County's true status should be applicable.

Because Mary's damages had already been determined, disclosing the amount was the only way to give instructions, evidence, and argument about the impact of the allocation any real meaning. District court's disclosure of Floyd County's status was accurate and necessary to explain "its conspicuous absence from trial."

Mary complained that Schwennen's counsel argued improperly in his closing that any fault attributable to William Abell should be assessed against Floyd County, because only Floyd County could have controlled William's actions (with signage). Mary's argument was hindered by her failure to have final argument reported and by her failure to prove, via a bill of exceptions under rule 241, what actually was said in final argument. As described by Schwennen's counsel on the record in his arguments on Mary's motion for new trial, counsel's argument was not improper.

Q

Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991)

Consortium

Nichols and Schweitzer were operating vehicles in the same direction on state highway. Nichols moved into left lane to pass Schweitzer, who was stopped, slowing down, or stopping. Nichols did not return to his lane before striking oncoming traffic in the left lane. Nichols was killed. His estate sued Schweitzer.

At trial, jury assessed 49% of the fault to Schweitzer and 51% to David Nichols. Court rendered judgment in favor of Schweitzer and against the estate on all claims except claim on behalf of Nichols' surviving spouse for loss of spousal consortium. As to that claim, court not only entered judgment in favor of estate and against Schweitzer but did not reduce claim by David Nichols' 51% fault. In its ruling, the district court acted consistently with recent opinions. See Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980); McIntosh v. Barr, 397 N.W.2d 516 (Iowa 1986); Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). Schweitzer argued, however, that Mrs. Nichols' consortium claim was different because it was "owned" and concededly was prosecuted by the estate.

HELD: Although section 613.15 designates the estate as the proper party to prosecute a claim for loss of spousal consortium, "there is no fair reason for having a different result on apportionment of consortium damages when the injured spouse has died than when he is alive."

Britt-Tech Corp. v. American Magnetics Corp., 463 N.W.2d 26 (Iowa 1990)

Contribution

Hardey was electrocuted while using a power washer manufactured by Britt-Tech. After jury verdict was entered against Britt-Tech, district court sustained Britt-Tech's motion for judgment n.o.v. The Court of Appeals reversed and remanded for trial only on damages. Britt-Tech then settled and obtained a release that named only Britt-Tech.

Britt-Tech then attempted to sue other manufacturers whose products were involved in Hardey's accident. HELD: Release did not satisfy the specificity requirements of Aid Insurance Co. v. Davis County, 426 N.W.2d 631 (Iowa 1988).

Q

Stalter v. Iowa Resources, Inc., 468 N.W.2d 796 (Iowa 1991)

Contribution

Railroad constructed spur siding track under Iowa Power electric transmission line. Railroad granted Iowa Power an easement. Railroad conveyed right-of-way to Heartland, who leased right-of-way to Iowa Interstate.

Plaintiff was electrocuted while working on railroad car located underneath Iowa Power's lines. Iowa Interstate had responsibility for railroad car. Plaintiff sued Iowa Power and Iowa Interstate. Iowa Power cross-petitioned against Railroad and Heartland and cross-claimed against Iowa Interstate for contribu-

tion and indemnity. Iowa Power contended that construction of the spur reduced clearance between the ground and its lines below what was required by safety standards.

Railroad moved for summary judgment. Iowa Power contended that it was entitled to contribution either under theory of premises liability or under theory of negligence in constructing the spur. District court sustained Railroad's motion for summary judgment.

HELD: Iowa Power's claim for contribution under premises liability fails because Railroad had no possessory or legal interest in property at time of accident. Iowa Power's request that an exception to the general rule be recognized along the lines of section 353 of the Restatement (Second) of Torts avails Iowa Power not at all for three reasons. First, section 353 relates to a vendor of land who conceals or fails to disclose a condition creating an unreasonable risk of harm. Section 353 does not apply if the condition and extent of the risk are obvious, and Iowa Power generated no substantial evidence to support a contention that the condition and risk were less than obvious. Second, section 353 does not apply if on reasonable inspection, by the vendee prior to purchase, the condition and risk were discoverable. Again, Iowa Power has not adduced substantial evidence to controvert discoverability. Third, a vendor's liability lasts only long enough to grant the vendee adequate time and opportunity to discover the condition and to repair against it. Iowa Power did not adduce substantial evidence that Railroad's vendee had insufficient time in the eight months before Stalter's accident to observe the condition and to act.

Iowa Power did adduce substantial evidence in support of its contention, however, that Railroad's negligence in constructing the spur renders it jointly liable to Stalter's injuries, and therefore subject to a claim for contribution. Whether or not Iowa Power's duty safely to maintain its power lines supersedes Railroad's duty of care with respect to construction of the spur is a matter for the jury.

Q

Allied Mutual Insurance Co. v. State, 473 N.W.2d 24 (Iowa 1991)

Contribution

State employee Lund was a passenger in a state automobile driven by Smith when it collided with vehicle driven by Sailor. Lund sued Sailor. Sailor's insurer, Allied, settled with Lund. Allied then sued State and Smith for contribution and indemnity. State and Smith moved for summary judgment. District court sustained motion as to both defendants and as against all Allied's claims.

HELD: Lund and Smith are co-employees. Lund's sole remedy against Smith, therefore, requires proof of gross-negligence. In order to obtain contribution, Allied also must establish gross negligence, which it cannot do on this record. It was a simple car accident.

Because Lund's sole remedy against State is a workers' compensation claim, Allied cannot establish that it and the State have common liability to Lund. Common-liability requirement does not deny equal protection.

Allied's indemnity claim against State fails as a matter of law, because State's vicarious liability as owner of vehicle for Smith's conduct rests on a duty no higher or greater than the duty owed by Smith. Even if Smith owed a duty of care, violation of it would not give rise to a claim by another tortfeasor for indemnity.

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Contributory Negligence

Defendant leased scaffolding to plaintiff's employer for use on a construction site. Defendant supplied a frame by one manufacturer and planks by another, so there was not a secure fit. Defendant adduced evidence that an inspection by plaintiff prior to using the scaffolding would have disclosed the incompatibility and resulting risk of injury. Jury assessed fault 50% to plaintiff and 50% to defendant.

HELD: Rinkleff, 375 N.W.2d 262 (Iowa 1985), which holds that a person assembling a structure for use above the ground has an obligation to evaluate stability and safety before its use, applies even when the user did not assemble. District court properly submitted issue of plaintiff's fault to jury.

Q

Bokhoven v. Klinker, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Costs

Jury found plaintiff 51% at fault, so he did not recover from defendant. Section 625.1 provides: "Costs shall be recovered by the successful against the losing party." Section 625.3 provides:

> Where the party is successful as to a part of the party's demand, and fails as to part, . . . the court on rendering judgment may make an equitable apportionment of costs.

District court required defendant to pay 49% of court costs.

HELD: Plaintiff was not successful on his claim, so district court had no authority under section 625.3 to make an equitable apportionment of costs. Section 625.4, dealing with multiple parties, was not applicable because defendant's cross-petition for indemnity was rendered moot by a 51% verdict.

Cowan v. Flannery, 461 N.W.2d 155 (Iowa 1990)

Interest

Under chapter 668 cases, at least, interest to be awarded for "future damages" accrues only from the date of entry of judgment.

Bokhoven v. Klinker, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Last Clear Chance

Bokhoven and his employer, Renaud, were servicing augers in a grain bin on a farm owned by Klinker. Bokhoven and Renaud were inside the bin and asked Klinker, who was outside, to turn on the motor. Everyone knew that Klinker was unfamiliar with the controls. When Klinker started the motor, a sweep auger clutch was inadvertently engaged and swept into Bokhoven, causing him serious injuries. Bokhoven sued Klinker. District court refused to instruct as requested by Bokhoven on last clear chance. Jury found Bokhoven 51% at fault.

HELD: "[D]octrine of last clear chance, even when considered a part of proximate cause, has no further function to perform where contributory negligence is no longer a complete bar to plaintiff's recovery. We abolished last clear chance as a separate doctrine in Stuart [v. Madison, 278 N.W.2d 284 (Iowa 1979)]. . . . [A]doption of chapter 668 . . . did not resurrect the doctrine. When a party wishes to assert last clear chance, the district court need not instruct more than by reference to standard proximate cause language.

COMMENT: Court approves ICJI 700.3:

> The conduct of a party is proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Meyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Legal Excuse

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. HELD: District court properly refused to instruct on affirmative defense of legal excuse for defendant's "impossibility" theory. District court properly instructed that truck had to remain right of the center line except when an obstruction (including but not limited to a parked car) requires truck to operate left of center. District court also properly instructed that such operation had to yield first to all vehicles travelling in the opposite direction. Defendant was entitled to no "impossibility" exception to this requirement.

Tanberg v. Ackerman Investment Co., 473 N.W.2d 193 (Iowa 1991)

Mitigation

Tanberg fell while attempting to leave a whirlpool bathtub in his motel room. He sued the owner and operator of the motel. Defendant asserted comparative fault as an affirmative defense and particularized this defense to include failure to mitigate damages "by losing weight after the fall."

At the time of the accident, plaintiff was 5'11" and weighed 310 pounds. His physician testified that plaintiff's main problem was his obesity. He recommended a weight loss program and a special diet. Another treating physician opined that losing weight could decrease his pain and decrease risk of developing complications long-term.

Plaintiff appealed from judgment entered on verdict assessing 70% of fault to plaintiff. HELD: "[U]nreasonable failure to attempt to lose weight pursuant to medical advice can be assessed as fault if weight loss will mitigate damages."

Q

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Mitigation

In personal injury action, defendant adduced evidence that plaintiff could have undergone shoulder surgery that generally restores normal strength and function. Procedure would require three to four days' hospitalization and would involve several days of acute pain, three weeks' immobilization, and three to six months of rehabilitation. District court instructed on plaintiff's duty of mitigation as part of defendant's affirmative defense of fault.

Jury assessed 50% of fault to plaintiff. HELD: Defendant adduced substantial evidence in support of its mitigation defense, notwithstanding plaintiff's claim that he could not pay for the procedure.

Meyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Mitigation

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. Plaintiff was not wearing a helmet, and his injuries included "severe brain damage."

Trial was bifurcated into liability and damage phases at plaintiff's request and over defendant's objection. Jury assessed fault 50% to plaintiff and 50% to defendant. In damage phase, defendant presented evidence and argument that plaintiff's failure to wear a helmet contributed to the severity of his injury. Court did not exclude such evidence or argument but instructed jury "that there is no common law or statutory duty to wear a helmet."

Court reversed on errors occurring in liability phase. For purposes of retrial, court declined to impose a common-law duty on a moped operator to wear a helmet.

After extensively reviewing the case law on both sides of the issue, with particularly extensive and laudatory treatment of an Arizona opinion that imposes such a duty, see Law v. Superior Court, 755 P.2d 1135 (1988), the court deferred to the legislature and declined to recognize a common-law duty to wear a helmet. Pivotal in the court's deference was the legislature's creation of a "seat belt" duty/defense with a 5% ceiling, and the legislature's repeal of the motorcycle helmet law in 1976. Because mitigation of damages is part of fault under chapter 668, judicial recognition of a "helmet" duty, coupled with the 50% rule in chapter 668 and no percentage ceiling similar to the "seat belt" duty,

> could actually prevent an otherwise innocent plaintiff from recovering anything. . . . Under the present state of the law a perfectly innocent moped operator who is hit by a speeding drunk driver could conceivably recover nothing. The jury could assess more than 50% of the total fault to the moped operator because the operator failed to wear a helmet.

Because mitigation is part of fault under chapter 668, the court expresses great doubt about the wisdom of bifurcating comparative fault trial into liability and damage aspects, at least where mitigation is an issue.

DISSENT: Two justices concluded that failure to wear a helmet can be found by a jury to breach the moped operator's general common-law duty to act prudently with respect to his own safety. That the legislature had not chosen to criminalize such behavior is not relevant on issue of plaintiff's civil fault.

COMMENT: First, how can a 15-year-old who elects to operate a moped at 25 m.p.h. on city streets with car and truck traffic without availing himself of the established and advertised benefits of a helmet be labeled "perfectly innocent?" Second, since the legislature has defined fault to include mitigation and has declared Iowa's public policy that a plaintiff whose conduct is more than 50% at cause for his injury should not be permitted to recover anything, the court's concern about the injustice of its own manufactured worse-case scenario should be addressed to the political process. It certainly has no relevance to the decision whether or not to recognize a common-law duty. Third, in comparing the absence of legislation on the "helmet" duty with the "seat belt" law, the court speaks in complimentary terms about the 5% limitation. This dicta bodes ill - and quite unnecessarily - for pending appeals on the constitutionality of that limitation. Fourth, the court begins its extensive discussion of this issue with the following observation:

> Failure to use a helmet or seat belt may . . . be a contributing cause to the injuries sustained and so may be relevant to the issue of damages.

Notwithstanding the court's refusal to recognize a duty, does this sentence mean that it remains permissible to prove that the cyclist was not wearing a helmet and that use of a helmet would have minimized or reduced or even eliminated injuries that were suffered?

Meyer v. City of Des Moines, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Q

Rules of Road

Fifteen-year-old operator of moped collided head-on with garbage truck that had moved into moped's lane on residential street in order to go around a parked car. HELD: After instructing on truck's duty to drive on the right-hand side and to the right of the center line in accordance with section 321.297(1)(b), plaintiff was not entitled to a separate instruction, based on section 321.275(4), on the duty not to deprive a motorcycle or moped of the full use of his lane. That statute was designed to regulate the activity of vehicles travelling in the same direction as the motorcycle/moped.

Lanz v. Pearson, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Sole Proximate Cause

As a result of multiple-vehicle accident, defendants asserted affirmative defense of act of God. Jury could find that at time of accident, highway was icy and snow covered, with center line obscured and road surface slippery. Visibility was reduced by darkness, falling snow, and the snow kicked up by travelling vehicles. District court submitted act of God as an affirmative defense and jury found no fault on defendants.

HELD: Defendants did not adduce substantial evidence that the driving conditions could not have been anticipated or expected, which is the third element of act of God defense under Oats v. Peter Pan Bakers, Inc., 258 Iowa 447, 138 N.W.2d 93 (1965).

COMMENT: Court reaffirmed Renze, 418 N.W.2d at 641-42, which held that God is not a party under section 668.2 and therefore cannot be assigned percentages of fault for his/her acts, and that concluded that act-of-God defense may be used, therefore, only as a particularization of the sole proximate cause argument.

Bokhoven v. Klinker, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Sole Proximate Cause

Bokhoven and his employer, Renaud, were servicing augers in a grain bin on a farm owned by Klinker. Bokhoven and Renaud were inside the bin and asked Klinker, who was outside, to turn on the motor. Everyone knew that Klinker was unfamiliar with the controls. When Klinker started the motor, a sweep auger clutch was inadvertently engaged and swept into Bokhoven, causing him serious injuries. Bokhoven sued Klinker. District court refused to instruct as requested by Bokhoven on last clear chance. Jury found Bokhoven 51% at fault.

HELD: "[D]octrine of last clear chance, even when considered a part of proximate cause, has no further function to perform where contributory negligence is no longer a complete bar to plaintiff's recovery. We abolished last clear chance as a separate doctrine in Stuart [v. Madison, 278 N.W.2d 284 (Iowa 1979)]. . . . [A]doption of chapter 668 . . . did not resurrect the doctrine. When a party wishes to assert last clear chance, the district court need not instruct more than by reference to standard proximate cause language.

COMMENT: Court approves ICJI 700.3:

> The conduct of a party is proximate cause of damage when it is a substantial factor in producing damage and when the damage would not

have happened except for the conduct. "Substantial" means the party's conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

Lanz v. Pearson, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Stuart v. Pilgrim

Lanz was operating her employer's vehicle with consent at the time of an accident that injured Lanz and damaged the employer's vehicle. Lanz and the employer sued. At trial, court refused to impute (by instruction or ruling) Lanz' percentage of fault to her employer. HELD: Enactment of Chapter 668 does not abrogate or revise Stuart v. Pilgrim.

COMMENT: In refusing to overrule Stuart v. Pilgrim, court makes no mention of section 668.3(2)(b), which authorizes trial court to treat two or more persons as a single party for purposes of assessing percentages of fault.

Court did not explain its express refusal to rule on the applicability of any employer-employee exception to Pilgrim under these facts.

Opinion also is silent on issue of whether in employer's property damage claim, jury can assess percentages of fault against consent-driver Lanz, the practical effect of which would be to force employer to sue Lanz or forsake the benefits of Stuart v. Pilgrim.

Principal Casualty Ins. Co. v. Norwood, 463 N.W.2d 66 (Iowa 1990)

Subrogation

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Principal provided insurance coverage for Norwood's automobile, which was involved in an accident. Principal paid Norwood $5,000.00 for property damage under the collision coverage, and timely claimed subrogation rights to that amount from Norwood's claim against the tortfeasor for personal injury and property damage (deductible on the collision coverage). Norwood settled with tortfeasor. When Norwood's attorney demanded reduction of Principal's subrogation by a pro-rata share of his contingent fee, Principal commenced this declaratory judgment action.

Section 668.5(3) and (4) provide:

> 3. Contractual or statutory rights of persons not enumerated in section 668.2 for subrogation for losses recovered in

> proceedings pursuant to this chapter shall not exceed that portion of the judgment or verdict specifically related to such losses, as shown by the itemization of the judgment or verdict returned under section 668.3(8) and according to the findings made pursuant to section 668.14(3), and such contractual or statutory subrogated persons shall be responsible for a pro rata share of the legal and administrative expenses incurred in obtaining the judgment or verdict.
>
> 4. Subrogation payment restrictions imposed pursuant to (3) apply to settlement recoveries, but only to the extent that the settlement was reasonable.

Supreme Court interpreted this statute just like it reads: to apply to settlements as well as judgments, such that Principal was responsible for its pro-rata share of Norwood's attorney's contingent fee, so long as the settlement is reasonable.

Bales v. Warren County, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Subrogation

A personal injury plaintiff whose medical expenses were paid by DHS and whose comparative fault was likely to be significant settled with his defendants in a document that gave him no money for his medical expense, indemnified him from any claim by DHS, and assigned his claim against DHS for attorney fees and expenses to defendants. Defendants deposited the amount of plaintiff's medical expenses with the court and filed a declaratory judgment action against DHS.

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HELD: Because DHS proceeds against its payee's tortfeasor only on the basis of subrogation, a personal injury plaintiff's comparative fault reduces DHS' entitlement to recovery of medical expenses proportionately.

COMMENT: Court rejected DHS's attempt to rely prospectively on 1989 Iowa Acts Ch. 111, § 1 (codified at section 249A.6(1)), which purports to apply DHS' subrogation rights to all of the assistance beneficiary's claims against tortfeasors.

Nieman v. Heil Co., 471 N.W.2d 790 (Iowa 1991)

Workers' Compensation

In a case governed by Goetzman instead of chapter 668, Nieman commenced a products liability action for a work-related injury. Nieman received $46,000.00 in workers' compensation benefits pursuant to a settlement agreement in which the employer and its insurer waived any claims for subrogation. After trial of the product liability action, the jury found Nieman to be 80% at fault. District court properly reduced his damages to $60,000.00.

Defendant applied for a credit in the amount of the workers' compensation payment. District court refused. HELD: Tortfeasor is not entitled to a credit for workers' compensation benefits paid to civil tort plaintiff for work-related accident that is caused by tortfeasor.

> [T]here is a firm statutory foundation for applying this principle. Our workers' compensation statutes expressly preserve the right of an employee to bring an action against third parties who are legally responsible for injuries resulting in payment of workers' compensation. . . . [S]ection 85.22(1) provides that the employer or the employer's insurer, who has made compensation payments, shall have a lien on the claim and shall be indemnified out the recovery of damages. The employer's right to a lien and to indemnification from an award of damages against a third party presupposes the claimant's right to recover those elements of damage for which workers' compensation has already been paid.

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TORTS

Fineran v. Pickett, 465 N.W.2d 662 (Iowa 1991)

Bystander

Parents and sisters of a child arrived at the scene of an accident after their daughter/sister had been struck by a vehicle. Parents and sisters sought damages, including emotional distress from having witnessed the immediate aftermath of the collision.

HELD: Bystander recovery for emotional distress is strictly limited to situations which involve witnessing peril to a victim and which have produced emotional distress from "sensory and contemporaneous observance of the accident as contrasted with the learning of the accident after its occurrence."

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

Conspiracy

Hoefer served for years as insurance agent for Washington National, who provided health benefits insurance for the employees of the Sioux City School District. In 1983, the district sought competitive bids in an effort to reduce premium costs, and ultimately awarded the contract to Wisconsin Education Association Insurance Trust (WEAIT).

"Hoefer's loss of this business prompted a flurry of litigation over WEAIT's authority to furnish health coverage in this state." Eventually, the Supreme Court held that school districts were prohibited by section 509A.6 from contracting for health coverage with unregulated entities like WEAIT. See Sioux City Community School District v. Iowa State Board, 402 N.W.2d 739 (Iowa 1987).

"Armed with these decisions, Hoefer proceeded to sue nearly everyone involved in the fateful decision to contract with WEAIT." Hoefer sued WEAIT and the teacher's union on theories of fraud, conspiracy, and tortious interference with prospective business relations, his action proceeds primarily from the allegation that WEAIT misrepresented its status and the district's legal ability to contract with WEAIT. Hoefer sued the school district and individual school board members for fraud, promissory estoppel, tortious interference with prospective business advantage, and unlawful disbursement of public funds. This second action focuses primarily on the district's and the board members' failure to discover the flaw in WEAIT's status.

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District court sustained all defendants' motions for summary judgment. Hoefer appealed.

HELD: Hoefer's fraud claim fails because, even assuming there was misrepresentation, Hoefer cannot dispute that Washington National's quote was in seventh place among all bidders. Hoefer's argument that this ranking resulted from the district's failure to credit Washington National's bid with premium surplus from previous years of claims experience was overcome beyond dispute by testimony from the district and Washington National that district would receive such surplus anyway, without continuing to do business with Washington National.

Hoefer's claim of conspiracy fails on the damage element as well as the element of "concerted action to accomplish an unlawful end or to accomplish a lawful end by unlawful means."

Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1990)

Defamation

During televised meeting before the city council a property sale, an attorney made a statement that he did not know what the rival bidder would use the property for, other than extortion. Bidder sued for slander. Jury found against attorney. The attorney appealed, contending:

> (1) His statements did not amount to slander per se, and
>
> (2) even if his statements were slanderous, he was shielded from liability due to qualified privilege.

HELD: Evidence established that attorney's statement unambiguously accused plaintiff of extortion. The defense of qualified privilege does not extend to a publication to the general public when the public does not have a valid interest in the subject matter.

Kiner v. Reliance Insurance Company, 463 N.W.2d 9 (Iowa 1990)

Defamation

Workers' compensation insurer refused to make payments for insured's pain medication, stating on three occasions to a claims processor and an insurance agent that the insured was addicted to the drugs. District court entered order for remittitur on verdicts in favor of plaintiff for slander, and against Reliance on its defense of qualified privilege.

HELD: Substantial evidence supported verdicts, and Reliance did not object to instructions on privilege. District court had no basis for reducing the damage verdict it merely found excessive after first concluding that it was not the result of passion and prejudice.

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Dramshop

Plaintiff sued social host for providing alcohol to plaintiff's driver, who was under the legal drinking age. See Bauer v. Dann, 428 N.W.2d 658 (Iowa 1988) (dramshop law does not preempt common-law claim against social host for providing alcohol to person under legal drinking age in violation of section 123.47). Section 123.47 prohibits supplying alcohol to a person, "knowing or having reasonable cause to believe" the person to be under-age.

HELD: District court properly required plaintiff to prove that social host "knowingly" supplied alcohol to plaintiff's driver.

Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Dramshop

Plaintiff's decedent bar-hopped by boat along the shore of Clear Lake. Eventually, he drove his boat into an unlighted dock and was killed. His blood alcohol level was .382. Plaintiff sued several bars, and went to trial against one. Jury returned a defense verdict.

Case arose after 1986 amendment to section 123.92, so plaintiff had to prove that "licensee or permittee knew or should have known the person [whom he or she was serving] was intoxicated." District court instructed in a manner similar to ICJI 1300.1, as requested by plaintiff, but refused to instruct as requested by plaintiff on the definition of "knew or should have known" or on a licensee's affirmative duty to determine the condition of a patron. Plaintiff requested district court to instruct as follows:

> You are instructed that the term 'knew or should have known' . . . means that the liquor licensee must have actual or constructive knowledge of the intoxicated condition of the person served or that he would probably become so by being served. . . . [I]gnorance to his condition is no justification for lack of such knowledge where no effort is made to ascertain the person's condition since the opportunity to do so is the equivalent of knowledge itself. . . . [S]uch licensee, and its employees, must be trained and qualified to recognize intoxicated persons and the signs thereof and must pay attention to the condition of patrons by using their

> senses and experience to discover an intoxicated condition which is apparent or should be noticed.

Plaintiff cited sections 343 and 344 of the Restatement (2d) of Torts, dealing with duties owed by a possessor of land to an invitee.

District court did define "knew or should have known" in its instructions to mean:

> [D]efendant must have actual knowledge or . . . a reasonably observant person under the same or similar circumstances would have had knowledge.

HELD: Phrase "knew or should have known" has not acquired a peculiar and appropriate meaning that is defined only by reference to sections 343 and 344 of the Restatement. "If the legislature had intended to impose such an affirmative duty upon dram shop licensees and permittees it would have said so unambiguously." District court's definition of "knew or should have known" was accurate and acceptable.

Stalter v. Iowa Resources, Inc., 468 N.W.2d 796 (Iowa 1991)

Duty

Railroad constructed spur siding track under Iowa Power electric transmission line. Railroad granted Iowa Power an easement. Railroad conveyed right-of-way to Heartland, who leased right-of-way to Iowa Interstate.

Plaintiff was electrocuted while working on railroad car located underneath Iowa Power's lines. Iowa Interstate had responsibility for railroad car. Plaintiff sued Iowa Power and Iowa Interstate. Iowa Power cross-petitioned against Railroad and Heartland and cross-claimed against Iowa Interstate for contribution and indemnity. Iowa Power contended that construction of the spur reduced clearance between the ground and its lines below what was required by safety standards.

Railroad moved for summary judgment. Iowa Power contended that it was entitled to contribution either under theory of premises liability or under theory of negligence in constructing the spur. Iowa Power contended it was entitled to indemnity from Railroad because construction of the spur interfered with Iowa Power's easement and thus breached a duty of care, owed to Iowa Power by Railroad. District court sustained Railroad's motion for summary judgment.

HELD: Iowa Power's claim for contribution under premises liability fails because Railroad had no possessory or legal interest in property at time of accident. Iowa Power's request that an exception to the general rule be recognized along the lines of section 353 of the Restatement (Second) of Torts avails Iowa Power not at all for three reasons. First, section 353 relates to a vendor of land who conceals or fails to disclose a condition creating an unreasonable risk of harm. Section 353 does not apply if the condition and extent of the risk are obvious, and Iowa Power generated no substantial evidence to support a contention that the condition and risk were less than obvious. Second, section 353 does not apply if on reasonable inspection, by the vendee prior to purchase, the condition and risk were discoverable. Again, Iowa Power has not adduced substantial evidence to controvert discoverability. Third, a vendor's liability lasts only long enough to grant the vendee adequate time and opportunity to discover the condition and to repair against it. Iowa Power did not adduce substantial evidence that Railroad's vendee had insufficient time in the eight months before Stalter's accident to observe the condition and to act.

Iowa Power did adduce substantial evidence in support of its contention, however, that Railroad's negligence in constructing the spur renders it jointly liable to Stalter's injuries, and therefore subject to a claim for contribution. Whether or not Iowa Power's duty safely to maintain its power lines supersedes Railroad's duty of care with respect to construction of the spur is a matter for the jury.

District court properly dismissed Iowa Power's indemnity claim. Iowa Power failed to establish the existence of an easement at the time Railroad constructed the spur.

Peterson v. Schwertly, 460 N.W.2d 469 (Iowa 1990)

Duty

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Plaintiff was injured while trespassing on defendant's property. Defendant owns land adjacent to pond with tree overhang. People used the area for swimming without defendant's permission. Defendant had knowledge that people swam in the area and had taken steps, unsuccessfully, to discourage people from swimming in the area.

Sections 111C.3 and 111C.4 relieve land owners of duties toward those who use the land for recreational purposes. The statute is not limited to permissive users. A blanket abrogation of duty to all recreational users will encourage property owners to make lands suited for recreational uses more readily available.

Engstrom v. State, 461 N.W.2d 309 (Iowa 1990)

Duty

After terminating mother's parental rights, State began searching for adoptive home for child. State erroneously believed that child's father was deceased. State placed child with plaintiffs as potential adoptive parents while adoption proceedings continued. Child's father then appeared and demanded custody of his daughter. Juvenile court eventually awarded custody of child to the father. Plaintiffs sued the State and the individual social workers involved on theories of negligence, intentional infliction of emotional distress, violation of due process, and breach of contract. Defendants obtained summary judgment as to all claims.

HELD: Social worker does not owe an actionable duty to pre-adoptive parents to determine whether or not a natural parent is alive. Alleged violation of statutes do not generate a cause of action.

Shaw v. Soo Line Railroad Company, 463 N.W.2d 51 (Iowa 1990)

Duty

Automobile passengers were killed in a collision with a train at a railroad crossing. Plaintiffs alleged that semi-truck owners were negligent in parking a semi-trailer on private property so as to obstruct the view of motorists approaching the railroad crossing. Defendant contended that it owed no statutory or common-law duty to guard against the risk of harm from an obstructed view.

HELD: Section 321.358(8) prohibiting the parking of vehicles within 50 feet of a railroad crossing, applies only to vehicles parked on highways. Defendant had no statutory duty not to park on private property within 50 feet of a railroad crossing. Defendant had no common law duty not to obstruct a motorist's view of railroad tracks.

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Eldred v. McGladrey, Hendrickson & Pullen, 468 N.W.2d 218 (Iowa 1991)

Duty

Plaintiffs held thrift certificates or subordinated debentures issued by MorAmerica Financial Corporation and its wholly-owned subsidiary the Morris Plan Company. McGladrey audited MorAmerica and Morris Plan for the last time in December 1983, in an opinion that covered the fiscal year ending September 30, 1983. Plaintiffs never saw McGladrey's opinion and never saw any resulting state reports issued as a result of that opinion. Nevertheless,

plaintiffs claim that McGladrey failed to disclose knowledge it acquired after its 1983 audit on the financial health of MorAmerica and Morris Plan. Plaintiffs also contend that McGladrey aided and abetted a violation of section 536A.25, by failing to disclose unsecured loans by MorAmerica and Morris Plan to Peter Bezanson, chairman of MorAmerica's board of directors.

HELD: Violation of section 536A.25 does not create a private remedy. See Unertl v. Bezanson, 414 N.W.2d 321 (Iowa 1987).

Meck v. Iowa Power & Light Co., 469 N.W.2d 274 (Iowa App. 1991)

Duty

Meck was employed as a millwright by APM, which had a labor and services contract with Iowa Power under which APM was to supply millwrights to perform maintenance at Iowa Power's plant. Contract between APM and Iowa Power provided that the millwrights were to perform under the direction/supervision of Iowa Power. Meck was injured in the course of his employment for APM while working at Iowa Power's plant, when a conveyor belt on which he was standing began to move.

Meck adduced evidence that Iowa Power had over four miles of belts at the site to transport coal to its generators. The belts are operated from a remote control room that is not in visual contact with the belt on which Meck was standing. Iowa Power usually kept an employee on the floor to verify that such belts are clear before they are started. No such personnel was present at the time of Meck's accident. Meck also adduced substantial evidence that the warning horn in Meck's vicinity may have worked only intermittently and that Iowa Power knew or should have known of same. Another employee attempted to alert the control room of Meck's precarious situation before the belt was activated, but his radio did not work. Without disclosing the content of the instructions, the Court of Appeals held that Meck had adduced substantial evidence in support of his claim against Iowa Power for negligence, and that the jury instructions adequately instructed on Iowa Power's duty of care with respect to Meck.

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Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc., 473 N.W.2d at _____ (Iowa 1991)

Duty

City contracted with engineer Brice to prepare plans and specifications for city sewer project. City contracted with Peterson to perform the excavation work.

Brice's plans did not detail any protective methods to be used for Shepherd's property. Peterson used another engineer to design a protective system, and Brice approved those drawings. Nevertheless, Peterson departed from his own engineer's drawings and conducted the excavation in a manner that caused a wall in Shepherd's building to crack. When the crack was discovered, Brice, Peterson, and Shepherd met and discussed it. Peterson elected to proceed in the same manner, instructed Shepherd not to use the damaged corner while the construction proceeded, and to place scaffolding inside the building. Brice sent three letters expressing concern over further deterioration of the wall. At the end of the project, when the scaffolding was removed, the entire wall collapsed.

Shepherd sued Brice and Peterson. After trial, the jury assessed 30% of the fault against Brice and 70% against Peterson. The jury awarded compensatory damages, including loss of good will, and punitive damages. By special verdict, the jury found that Peterson's conduct was not directed specifically at Shepherd. District court allocated 25% of the punitive damage award to Shepherd and 75% to the civil reparation trust fund. All parties appealed.

HELD: Brice's motion for directed verdict should have been sustained. Although Brice's contractual argument (contract language disclosed a duty only to the city) does not determine existence of Brice's duty to Shepherd, Brice had no responsibility to control or supervise the day-to-day construction on site. The contractual duty on an engineer to inspect does not create responsibility for day-to-day construction methods or performance.

Irons v. Community State Bank, 461 N.W.2d 849 (Iowa App. 1990)

Fiduciary Duty

Farmers sued bank as a result of financial difficulties and bank's ultimate refusal to cooperate in refinancing of their farming operation through FmHA. HELD: Bank did not have a fiduciary relationship with Irons. Bank did not breach its fiduciary obligation.

Eldred v. Merchants National Bank, 468 N.W.2d 221 (Iowa 1991)

Fiduciary Duty

Plaintiffs held thrift certificates or subordinated debentures issued by MorAmerica Financial Corporation and its wholly-owned subsidiary the Morris Plan Company. MNB served as trustee under two trust indenture agreements for thrift certificates and subordinated debentures for an annual fee of $750.00.

MNB held no assets, and it had limited duties as proscribed by the trust agreements.

HELD: MNB's duties as fiduciary are defined and confined by the written trust indenture agreements. The common law imposes no additional fiduciary obligations. Contrary to the normal trust situation, MNB held no assets as trustee.

Hoelscher v. Sandage, 462 N.W.2d 289 (Iowa App. 1990)

Fraud

Mr. and Mrs. Warman transferred the farm to their four children, with the mother, Thelma, retaining a life interest. The Warmans then divorced. Years later, Thelma became concerned about estate taxes. At the recommendation of defendant Sandage, a long time friend, Thelma contacted an attorney for estate-planning. In 1983, upon the attorney's recommendation, Thelma established a revocable trust with a pour-over will and "Crummy" trusts for each child. Defendant Sandage and Thelma were named co-trustees of the trust. The trust authorized the trustee to mortgage property without notice and held the trustee liable only for willful misconduct.

Later that year, plaintiffs (beneficiaries and their spouses) and Thelma signed documents transferring interest in the farm. The beneficiaries transferred their remainder interests to Thelma in exchange for 11% fee interests in the farm. Thelma became a 67% owner of the farm while each child became an 11% owner.

Thelma and the children subsequently mortgaged the entire farm to secure a new operating loan. Plaintiffs claimed that they did not know what they were signing. Two years later, the bank foreclosed on the loan, taking all the property except the homestead.

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Thelma voluntarily revoked the trust, and plaintiffs sued Sandage for fraud as an individual and as trustee. District court found that the relationships between defendant and Thelma and between defendant and plaintiffs were not confidential relationships which give rise to a fiduciary duty. Defendant did not have so much influence over Thelma or the plaintiffs that they were not at arm's length, and he did not unduly influence them. Sandage did not act in a fiduciary capacity in connection with the farm transfer. The transfer did not involve trust property, so defendant did not have an interest in the transfer or a duty of disclosure.

HELD: District court's findings were supported by substantial evidence.

National Bank and Trust Co. v. Campbell, 463 N.W.2d 104 (Iowa 1990)

Fraud

Campbell engaged in check "kiting," and National Bank and Trust Company (NBT) acquiesced in the practice until it was forced to control it. NBT eventually sought security for the float, and sought to bring Campbell in line with lending limits to avoid criminal and civil liability. Campbell transferred part of the insecured debt to his children to bring his debt within lending limits, but it was understood that he would remain liable for the debts. He gave NBT a quit claim deed to his farm, with the understanding that the deed was given only to meet banking regulations and that Campbell would continue to own, maintain, and control the farm. The Campbells continued to treat the farm as their own. NBT insisted on a lease to satisfy bank examiners. NBT referred to these events as paper transactions to satisfy examiners.

NBT gradually but eventually took control of the farm and eventually terminated the tenancy and sued the Campbells for "back rent." The Campbells brought a counterclaim against NBT for fraud. The court dismissed NBT's claims and awarded Campbell compensatory damages. Both parties appealed.

HELD: Substantial evidence supports finding that NBT fraudulently misrepresented the nature and purpose of its transactions.

Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Fraud

Bates and Van Baale drove vehicles that collided at an intersection. Bates at first was unsure of who had the green light, acknowledged to the investigating officer at the hospital that his light "may have been red," and later claimed that he had the green light. Van Baale and his passenger, Hedlund, insisted that Van Baale had the green light. The officer issued Bates a summons. Bates and Van Baale testified at the traffic trial, and Bates was acquitted.

Bates sued Van Baale. Allied hired counsel La Suer to defend Van Baale. At the time of trial, La Suer believed the case was defensible. A number of facts supported his conclusion. Van Baale and Hedlund both insisted that Van Baale had the green light. The police officer would testify about Bates' concession in the hospital. Bates' insurer had paid Van Baale's property damage claim and Hedlund's personal injury claim.

After trial had commenced, Hedlund told La Suer that he had been lying and that Van Baale had run a red light.

La Suer immediately advised the Allied adjuster, who authorized La Suer to spend up to the policy limits of $20,000.00 to settle. La Suer confronted Van Baale, who then admitted that he ran a red light. La Suer then negotiated a settlement for $15,000.00 without disclosing to Bates or his counsel what he had learned.

"By the next day La Suer had decided he should withdraw from the case." Bates' counsel also discovered the change in circumstances. A hearing was held, and the court permitted La Suer to withdraw subject to notifying Van Baale. Two days later, new defense counsel for Van Baale offered Allied's policy limits of $20,000.00, which eventually was accepted.

Bates then sued Allied, Van Baale, and La Suer for bad faith, unfair trade practices, fraud, and intentional infliction of emotional distress. Allied and La Suer moved for summary judgment, which was granted.

HELD: Without regard to whether the other elements of fraud can be established by Bates, recision of the original settlement agreement and payment by Allied of its policy limits establishes that Bates cannot recover any benefit-of-the-bargain damages. Bates has established no consequential damages or the incursion of out-of-pocket expenses as an alternative measure of fraud damages.

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

Fraud

Hoefer served for years as insurance agent for Washington National, who provided health benefits insurance for the employees of the Sioux City School District. In 1983, the district sought competitive bids in an effort to reduce premium costs, and ultimately awarded the contract to Wisconsin Education Association Insurance Trust (WEAIT).

"Hoefer's loss of this business prompted a flurry of litigation over WEAIT's authority to furnish health coverage in this state." Eventually, the Supreme Court held that school districts were prohibited by section 509A.6 from contracting for health coverage with unregulated entities like WEAIT. See Sioux City Community School District v. Iowa State Board, 402 N.W.2d 739 (Iowa 1987).

"Armed with these decisions, Hoefer proceeded to sue nearly everyone involved in the fateful decision to contract with

WEAIT." Hoefer sued WEAIT and the teacher's union on theories of fraud, conspiracy, and tortious interference with prospective business relations, his action proceeds primarily from the allegation that WEAIT misrepresented its status and the district's legal ability to contract with WEAIT. Hoefer sued the school district and individual school board members for fraud, promissory estoppel, tortious interference with prospective business advantage, and unlawful disbursement of public funds. This second action focuses primarily on the district's and the board members' failure to discover the flaw in WEAIT's status.

District court sustained all defendants' motions for summary judgment. Hoefer appealed.

HELD: Hoefer's fraud claim fails because, even assuming there was misrepresentation, Hoefer cannot dispute that Washington National's quote was in seventh place among all bidders. Hoefer's argument that this ranking resulted from the district's failure to credit Washington National's bid with premium surplus from previous years of claims experience was overcome beyond dispute by testimony from the district and Washington National that district would receive such surplus anyway, without continuing to do business with Washington National.

Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255 (Iowa 1991)

Intentional Infliction of Emotional Distress

Bates and Van Baale drove vehicles that collided at an intersection. Bates at first was unsure of who had the green light, acknowledged to the investigating officer at the hospital that his light "may have been red," and later claimed that he had the green light. Van Baale and his passenger, Hedlund, insisted that Van Baale had the green light. The officer issued Bates a summons. Bates and Van Baale testified at the traffic trial, and Bates was acquitted.

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Bates sued Van Baale. Allied hired counsel La Suer to defend Van Baale. At the time of trial, La Suer believed the case was defensible. A number of facts supported his conclusion. Van Baale and Hedlund both insisted that Van Baale had the green light. The police officer would testify about Bates' concession in the hospital. Bates' insurer had paid Van Baale's property damage claim and Hedlund's personal injury claim.

After trial had commenced, Hedlund told La Suer that he had been lying and that Van Baale had run a red light.

La Suer immediately advised the Allied adjuster, who authorized La Suer to spend up to the policy limits of $20,000.00 to settle. La Suer confronted Van Baale, who then admitted that he

ran a red light. La Suer then negotiated a settlement for $15,000.00 without disclosing to Bates or his counsel what he had learned.

Bates then sued Allied, Van Baale, and La Suer for bad faith, unfair trade practices, fraud, and intentional infliction of emotional distress. Allied and La Suer moved for summary judgment, which was granted.

HELD: Plaintiff has failed to show that he has suffered "severe or extreme emotional distress." Plaintiff's claim is one of anger, loss of sleep, and unhappiness due to preoccupation with his treatment by the legal system.

Kansas City Life Insurance Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)

Interference

KCL successfully foreclosed farm mortgage, but then failed in the fall of 1986 to notify tenant Hullinger (who had leased indirectly from receiver appointed in foreclosure action commenced by junior mortgagee) of KCL's intent not to renew farm lease. KCL had consented to appointment of receiver in separate foreclosure proceeding and was aware of Hullinger's status as tenant. In the spring of 1987, when Hullinger applied for USDA's 1987 price support and production adjustment program, KCL notified the USDA that it, not Hullinger, was entitled to register the farm for the program, and it refused to consent to Hullinger's application.

HELD: Hullinger's application and signature on USDA form titled "contract to participate in the 1987 PSPAP" generated a business relationship of a type to be protected against intentional interference. Jury could find that KCL intended to interfere and intended to harm Hullinger.

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Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990)

Interference

Former employee sued employer for breach of at-will employment contract and employer's franchisor for intentional interference with that contract. Case was dismissed, but the Supreme Court held that a third party may be liable for intentional interference with an at-will employment contract. On remand, jury found in favor of plaintiff and awarded actual and punitive damages against franchisor.

HELD: Evidence did not support the verdict. For a third party to be liable for intentional interference with an at-will contract, there must be substantial evidence of improper conduct. The court generally defined improper conduct as conduct not fair and reasonable under the circumstances, and did so after relying on and quoting extensively with approval from the restatement and comments to it. In particular but certainly not exclusively, the court focused for the first time on section 767:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference, and
>
> (g) the relations between the parties.

Toney claimed that Casey's was motivated to cause his employer (a Casey's franchisee) to fire her in order to standardize all Casey's managers' contracts. Assuming this to be its purpose, such conduct was "fair and reasonable" and motivated by a "legitimate business purpose."

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Irons v. Community State Bank, 461 N.W.2d 849 (Iowa App. 1990)

Interference

Farmers sued bank as a result of financial difficulties and bank's ultimate refusal to cooperate in refinancing of their farming operation through FmHA. HELD: Irons failed to adduce substantial evidence that bank interfered with the Irons-FmHA relationship.

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

Interference

Hoefer served for years as insurance agent for Washington National, who provided health benefits insurance for the employees of the Sioux City School District. In 1983, the district sought competitive bids in an effort to reduce premium costs, and ultimately awarded the contract to Wisconsin Education Association Insurance Trust (WEAIT).

"Hoefer's loss of this business prompted a flurry of litigation over WEAIT's authority to furnish health coverage in this state." Eventually, the Supreme Court held that school districts were prohibited by section 509A.6 from contracting for health coverage with unregulated entities like WEAIT. See Sioux City Community School District v. Iowa State Board, 402 N.W.2d 739 (Iowa 1987).

"Armed with these decisions, Hoefer proceeded to sue nearly everyone involved in the fateful decision to contract with WEAIT." Hoefer sued WEAIT and the teacher's union on theories of fraud, conspiracy, and tortious interference with prospective business relations, his action proceeds primarily from the allegation that WEAIT misrepresented its status and the district's legal ability to contract with WEAIT. Hoefer sued the school district and individual school board members for fraud, promissory estoppel, tortious interference with prospective business advantage, and unlawful disbursement of public funds. This second action focuses primarily on the district's and the board members' failure to discover the flaw in WEAIT's status.

District court sustained all defendants' motions for summary judgment. Hoefer appealed.

HELD: Hoefer's fraud claim fails because, even assuming there was misrepresentation, Hoefer cannot dispute that Washington National's quote was in seventh place among all bidders. Hoefer's argument that this ranking resulted from the district's failure to credit Washington National's bid with premium surplus from previous years of claims experience was overcome beyond dispute by testimony from the district and Washington National that district would receive such surplus anyway, without continuing to do business with Washington National.

Hoefer's claim of tortious interference fails on the same element of damages and on the requirement that Hoefer establish that defendants acted "with a predominantly improper purpose." See Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984).

Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991)

Interference

Hospital and association of hospitals terminated their employment of administrator, allegedly because of his age. Grahek filed a complaint with the civil rights commission, but the commission dismissed it as being filed beyond the 180-day statute of limitations. Administrator then sued his employers for breach of contract, breach of implied covenant of good faith and fair dealing, wrongful termination, fraudulent and negligent misrepresentation, and intentional interference with contractual relations. District court entered summary judgment in favor of defendants, against all of Grahek's claims.

HELD: Grahek's claims for breach of contract, misrepresentation, and interference are separate and independent causes of action, and are not pre-empted by the exclusive remedies provided by chapters 601A for age discrimination. The misrepresentation and interference claims focus on conduct that, if true, is actionable without regard to whether or not the motivation also violates chapter 601A.

Meirick v. Weinmeister, 461 N.W.2d 348 (Iowa App. 1990)

Medical Malpractice

Minor and her parents sued physician for medical malpractice, alleging that physician's negligence during mother's pregnancy, labor, and delivery caused the child's brain damage. The trial court found no negligence on the part of the doctor.

HELD: Plaintiff's expert and defendant's expert differed and thus created questions of fact for the jury. Although the evidence could possibly have supported a finding of negligence, it was not so overwhelming as to require a finding of negligence as a matter of law.

Doe v. Johnston, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Medical Malpractice

Patient acquired HIV from post-surgical blood transfusion ordered by surgeon, who had not disclosed risk of contracting AIDS from a blood transfusion when advising patient of the risks of surgery. Patient sued surgeon for failing to disclose known risk and available alternative of autologous transfusions. Surgeon conceded knowledge of risk, but regarded it as too low to be disclosed. Jury returned defense verdict.

HELD: Physician's decision not to disclose known risk or availability of autologous transfusions does not constitute negligence as a matter of law. Both sides adduced expert testimony on levels of knowledge, technology, and practice at time of transfusion. Because the experts differed on the extent of the actual risk, a jury question was generated. Because defendant adduced testimony that at the time of patient's transfusion, autologous transfusions were rare and were resisted by local blood banks, evidence of reasonable availability was in conflict and was for the jury to resolve.

For the same reasons, district court properly refused to instruct that autologous transfusion was feasible at the time of plaintiff's surgery. While defendant conceded the possibility of autologous transfusion he sharply disputed reasonable availability.

Cox v. Jones, 470 N.W.2d 23 (Iowa 1991)

Medical Malpractice

Surgeon performed cataract removal operation on plaintiff. When her vision began to deteriorate one year later, she attempted to revisit surgeon. The office requested that she pay $50.00 or provide proof of insurance before giving her an appointment, because her outstanding bills had not been paid. Plaintiff saw another physician, Zweben, who referred her to University Hospitals for emergency surgery on a detached retina.

Plaintiff sued doctor in May 1988. The 180-day deadline from section 668.11 for certifying an expert witness expired in December 1988. Plaintiff certified no expert and requested no extension during that six-month period. In July 1989, plaintiff disclosed Zweben as a treating physician with knowledge regarding his treatment of plaintiff. Defendant deposed Zweben in July of 1989. On January 1, 1990, thirteen months late, plaintiffs certified Zweben as their expert witness.

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Defendant moved to strike plaintiff's designation of expert witness for violation of section 668.11. District court sustained defendant's motion and struck Zweben's testimony on issues of medical negligence or standard of care.

HELD: Plaintiff failed to comply with section 668.11's 100-day deadline for certifying an expert, and failed to show good cause for obtaining an extension of the deadline.

Absent expert witness, plaintiff cannot proceed on her claims of lack of informed consent, negligence in failing to schedule follow-up visits, or patient abandonment. Plaintiff needed expert testimony to establish "the nature, likelihood of occurrence, and materiality of retinal detachment" for purposes of her informed-consent claim. Plaintiff needed expert testimony to

determine whether retinal detachment was occurring at the time of follow-up visits to defendant, as well as the standard of care for follow-up on cataract surgery, on her claim of negligence in after-surgical care. Plaintiff needed expert testimony to establish that she was at a critical stage of medical care when defendants allegedly withdrew medical treatment. District court properly entered summary judgment on plaintiff's claims.

Irons v. Community State Bank, 461 N.W.2d 849 (Iowa App. 1990)

Misrepresentation

Farmers sued bank as a result of financial difficulties and bank's ultimate refusal to cooperate in refinancing of their farming operation through FmHA. HELD: Because court found no fiduciary relationship, "there can be no fraudulent misrepresentation based on breach of a fiduciary duty." In addition, bank made no misrepresentations.

Air Host Cedar Rapids v. Cedar Rapids Airport Commission, 464 N.W.2d 450 (Iowa 1990)

Misrepresentation

The provisions of a signed leased between a concessionaire and the Cedar Rapids Airport Commission stated that if a new airport was constructed, the current concessionaire would have the first right to leased space in the new terminal. The terms and conditions of such lease, however, were to be mutually agreed upon by the parties.

The second provision stated that if the concessionaire incurred any expense in planning the new terminal and did not obtain the new lease, the Commission would reimburse the concessionaire for its expenses, not to exceed $20,000 without the written consent of the Commission.

Air Host, the concessionaire, did not obtain a lease in the new airport terminal. Air Host brought this suit claiming breach of contract and fraudulent misrepresentation. The jury found for Air Host and awarded substantial, actual, and punitive damages. The Cedar Rapids Airport Commission appealed.

HELD: Although there was no evidence of material misrepresentation or reliance at the time of the original lease, there was sufficient evidence that the Commission materially misrepresented their intentions during negotiations for the lease in the new terminal, such that Air Host was deterred from soliciting a profitable contract elsewhere.

Eldred v. McGladrey, Hendrickson & Pullen, 468 N.W.2d 218 (Iowa 1991)

Misrepresentation

Plaintiffs held thrift certificates or subordinated debentures issued by MorAmerica Financial Corporation and its wholly-owned subsidiary the Morris Plan Company. McGladrey audited MorAmerica and Morris Plan for the last time in December 1983, in an opinion that covered the fiscal year ending September 30, 1983. Plaintiffs never saw McGladrey's opinion and never saw any resulting state reports issued as a result of that opinion. Plaintiffs claim that McGladrey failed to disclose knowledge it acquired after its 1983 audit on the financial health of MorAmerica and Morris Plan. Plaintiffs also contend that McGladrey aided and abetted a violation of section 536A.25, by failing to disclose unsecured loans by MorAmerica and Morris Plan to Peter Bezanson, chairman of MorAmerica's board of directors.

HELD: Whether plaintiffs claim fraudulent, negligent, or even innocent misrepresentation, they must prove reliance. Plaintiffs did not rely on McGladrey's opinion, because they never saw it. Plaintiffs cannot satisfy reliance requirements simply by claiming that they "relied" on the state to review McGladrey's opinion for them.

Also, McGladrey has no obligation to supplement its audit report with knowledge acquired by McGladrey after issuing its audit, unless it acquires knowledge that its opinion was erroneous at the time it was made. Plaintiffs concede that McGladrey's opinion was correct when made.

Violation of section 536A.25 does not create a private remedy. See Unertl v. Bezanson, 414 N.W.2d 321 (Iowa 1987).

Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc., 473 N.W.2d 31 (Iowa 1991)

Q

Misrepresentation

Hospital and association of hospitals terminated their employment of administrator, allegedly because of his age. Grahek filed a complaint with the civil rights commission, but the commission dismissed it as being filed beyond the 180-day statute of limitations. Administrator then sued his employers for breach of contract, breach of implied covenant of good faith and fair dealing, wrongful termination, fraudulent and negligent misrepresentation, and intentional interference with contractual relations. District court entered summary judgment in favor of defendants, against all of Grahek's claims.

HELD: Grahek's claims for breach of contract, misrepresentation, and interference are separate and independent causes of action, and are not pre-empted by the exclusive remedies provided by chapters 601A for age discrimination. The misrepresentation and interference claims focus on conduct that, if true, is actionable without regard to whether or not the motivation also violates chapter 601A.

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Product Liability

Defendant leased scaffolding to plaintiff's employer for use on a construction site. Defendant supplied a frame by one manufacturer and planks by another, so there was not a secure fit. Plaintiff sought to recover under theory of strict liability as well as negligence.

HELD: "[T]he facts of this case do not fall within the realm of strict liability. Strict Liability is a method by which plaintiffs can recover from defendants who place defective products in the stream of commerce. The doctrine has been applied to retailers in part to give plaintiffs a more accessible enterprise to proceed against, as compared to a distant manufacturer. There is no such similarity in this case - the plaintiff would have no cause of action against the manufacturer of the scaffold, because there was no defect in the scaffold. The problem was simply one of incompatible components being assembled as a unit. The manufacturer of the frame never intended it to be used with planks made by another manufacturer."

Hoefer v. Wisconsin Education Association Insurance Trust, 470 N.W.2d 336 (Iowa 1991)

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Promissory Estoppel

Hoefer served for years as insurance agent for Washington National, who provided health benefits insurance for the employees of the Sioux City School District. In 1983, the district sought competitive bids in an effort to reduce premium costs, and ultimately awarded the contract to Wisconsin Education Association Insurance Trust (WEAIT).

"Hoefer's loss of this business prompted a flurry of litigation over WEAIT's authority to furnish health coverage in this state." Eventually, the Supreme Court held that school districts were prohibited by section 509A.6 from contracting for health coverage with unregulated entities like WEAIT. See Sioux City Community School District v. Iowa State Board, 402 N.W.2d 739 (Iowa 1987).

"Armed with these decisions, Hoefer proceeded to sue nearly everyone involved in the fateful decision to contract with WEAIT." Hoefer sued WEAIT and the teacher's union on theories of fraud, conspiracy, and tortious interference with prospective business relations, his action proceeds primarily from the allegation that WEAIT misrepresented its status and the district's legal ability to contract with WEAIT. Hoefer sued the school district and individual school board members for fraud, promissory estoppel, tortious interference with prospective business advantage, and unlawful disbursement of public funds. This second action focuses primarily on the district's and the board members' failure to discover the flaw in WEAIT's status.

District court sustained all defendants' motions for summary judgment. Hoefer appealed.

HELD: Hoefer's fraud claim fails because, even assuming there was misrepresentation, Hoefer cannot dispute that Washington National's quote was in seventh place among all bidders. Hoefer's argument that this ranking resulted from the district's failure to credit Washington National's bid with premium surplus from previous years of claims experience was overcome beyond dispute by testimony from the district and Washington National that district would receive such surplus anyway, without continuing to do business with Washington National.

Hoefer's claims against the district and individual board members fail on the undisputed evidence as to damages.

Cutler v. Klass, Wicher & Mishne, 473 N.W.2d 178 (Iowa 1991)

Suicide

Cutler, a partner in a law firm, underwent hospitalization for depression as a result of financial problems arising from his investment in a farming operation. Upon his release, he notified the firm of his desire to return to work on a part-time basis. Partnership resolved to require contact between Cutler's doctor and partnership as a condition to Cutler's return. Firm sent letter to Cutler advising him of this decision. One partner telephoned Cutler's close friend to warn about the letter. Another partner took a phone call from Cutler's wife (who had not seen the letter) and spoke harshly with her. Cutler committed suicide after reading the letter.

His estate sued firm for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. District court sustained a motion to dismiss first two counts and sustained a motion for summary judgment on the last count.

HELD: I. Firm's dispatch of letter advising Cutler of partnership's decision to condition his return upon partnership's interview of physician is not a tortious act. Firm's ethical obligations required firm to reach conclusion about Cutler's fitness to practice. II. Court has never recognized cause of action for negligent infliction of emotional distress and certainly cannot recognize it now, given the holding on count one. III. Firm's actions did not constitute outrageous conduct.

COMMENT I: Court was very critical of district court's order sustaining motions to dismiss and very critical of defendant for filing motions to dismiss:

> Both the filing and the sustaining are poor ideas.
>
> . . .
>
> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

COMMENT II: Decision rendered it unnecessary to determine whether or not the estate could recover wrongful-death damages in a breach of contract action. Court notes, however, that the majority rule denies such recovery.

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Coster v. Crookham, 468 N.W.2d 802 (Iowa 1991)

Trust

In 1974 John and Eleanor Coster placed their farms and farming operation in trust, with attorney Crookham serving as trustee. In 1982, Iowa Trust & Savings Bank (Iowa Trust) began lending money to the trust and the Costers individually. Crookham and the Costers subsequently secured Iowa Trust's agreement to provide bookkeeping and accounting services and other management services for the trust and for Costers personally. Iowa Trust, the Costers, and Crookham signed a written agreement (content of which

is not described in the opinion). Iowa Trust continued to loan money to the trust after it commenced to provide services to the trust that normally would be performed by a trustee.

With court order based on application that did not disclose true purpose for distribution, Crookham distributed $90,000.00 to Coster for Coster's use in assisting a friend implicated in a check-kiting scheme.

In 1976 Crookham and Gordin, the sole owners of G & L Industries, acquired the stock of Muscatine Lighting Company (Musco). Terms of the stock-purchase agreement provided that the owners of Musco were to be released from Musco's existing financial obligations to First National Bank of Muscatine (FNB). After reviewing financial statements of Crookham, Gordin, and G & L Industries, FNB agreed to release Musco's owners. In order to obtain an SBA release of those personal guarantees, however, FNB required additional financing. As trustee of the Coster trust, Crookham signed a guarantee of the new investors' pledges to FNB on behalf of the trust, which guarantee was accepted by FNB. G & L proceeded to purchase Musco, and FNB never called upon the Coster trust to make any payment under the guarantee. FNB eventually released the Coster trust from the guarantee.

Costers sued Crookham for (1) self-dealing in connection with the Musco transaction and (2) mal-administration in connection with distributions of principal to John Coster at his direction and despite the spendthrift nature and purposes of the trust. Plaintiffs sued Gordin for his role as Crookham's investment partner in the Musco transaction. Plaintiffs sued FNB for its role in the Musco transaction. Plaintiffs sued Iowa Trust, claiming Iowa Trust became a co-trustee and that its subsequent loans constituted self-dealing.

On the self-dealing claim against Crookham, district court instructed that trust beneficiaries could recover only to the extent the trust suffered a loss from the breach. Jury found that Crookham breached his fiduciary duty, but awarded no damages. On the mal-administration claim, jury verdict against Crookham bears no mathematical relationship to the loss occasioned by a single improper distribution.

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District court instructed on plaintiffs' claims against Gordin and FNB that plaintiffs had to prove knowledge or notice on their part that Crookham, as trustee, had committed a breach of fiduciary duty, and participation by Gordin or FNB in or aid of or assistance to such breach. Jury found for Gordin. Jury found against FNB but found no loss to the trust and awarded no damages against FNB.

As to the mal-administration claim against Iowa Trust, jury found that Iowa Trust had served as a trustee, that it had loaned money to the trust at interest, and that it therefore had

profited from self-dealing, and had not obtained authority to do so. Jury awarded damages in the amount of the interest earned by Iowa Trust.

HELD: District court improperly limited trust's recovery from Crookham for self-dealing in the Musco transaction to losses suffered by trust. Trustee is responsible not only for losses but for any profits made by him as a result of his self-dealing. Case must be remanded for jury determination of extent to which Crookham's pledge of trust assets resulted in profits to Crookham.

District court properly instructed on plaintiffs' burden to prove that Gordin and/or FNB had knowledge of Crookham's breach of trust. Under section 326, Restatement (Second) of Trusts, third person must have notice of breach. Knowledge that third person is dealing with a trust is insufficient to establish liability on a third party who is not a transferee of trust property. Also, jury verdict that trust had not suffered a loss was fatal to claim against FNB. Law imposing responsibility on Crookham to trust for profits derived from self-dealing is applicable to him as trustee. FNB is a third party and liable only in the event that trust suffered a loss.

District court erred in its instructions on mal-administration claim against Crookham. Trust's measure of damages is limited to losses occasioned by unauthorized or inappropriate distributions or any profits derived by trustee as a result of distributions. Plaintiffs did not introduce any evidence of profiteering as a result of distributions. Court also erroneously instructed on reporting duties of extra-judicial trustee. Because plaintiffs' evidence established only one distribution that a jury could find to be inappropriate, case must be remanded for new trial on the mal-administration claim. On re-trial, court may continue to instruct as to the nature and purpose of a spendthrift trust.

Verdict against Iowa Trust for interest paid by trust to Iowa Trust on loans by Iowa Trust to trust is supported by substantial evidence and is consistent with Iowa law. Plaintiffs adduced substantial evidence to support finding that Iowa Trust acted as a trustee. Section 633.155 provides:

> No fiduciary shall in any manner engage in self-dealing, except on order of court after notice to all interested persons, and shall derive no profit other than the fiduciary's distributive share in the estate from the sale or liquidation of any property belonging to the estate.

Financial institution that acts as fiduciary cannot, without authorization from the trust document itself or through compliance with section 633.155, loan money to an entity for which it serves as trustee. Absent such authority, financial institution's profit

in the form of interest paid by debtor on loans, violates section 633.155 and trustee's fiduciary obligation.

Carstens v. Central National Bank and Trust Company, 461 N.W.2d 331 (Iowa 1990)

Trustee Malpractice

A contingent remainderman has no cause of action at law against the trustee.

Hanson v. Minette, 461 N.W.2d 592 (Iowa 1990)

Trustee Malpractice

Hanson, the 42-year-old youngest son of the founder of Winnebago Industries, Inc., established a trust with his $40 million worth of Winnebago stock. Hanson developed a friendship with Minette, and, after Minette graduated from law school, executed a power of attorney in favor of Minette.

After Winnebago stock declined in value to the point where Hanson was merely a millionaire, Hanson made Minette and Bankers Trust his new co-trustees. Minette revised the trust document pursuant to Hanson's direction and Hanson's agreements with Banker's Trust. Hanson spent the rest of his trust assets over the next several years, and then sued Minette and Bankers Trust.

Trust provided:

> It is my desire without making it mandatory that such power to make discretionary payment of income or principal shall be exercised by the trustees subject to the following guides: (1) such power shall be exercised liberally for the beneficiary, without regard to more remote interests, to provide for the health, comfortable support, education . . . and welfare of the beneficiary, . . . taking into account the beneficiary's customary standard of living and station in life.

HELD: Bankers Trust did not breach its fiduciary duty by making excessive distributions, by mismanaging trust assets, or by self-dealing. Insertion of an exculpatory clause in the trust document when Minette revised it, at the insistence of Bankers Trust, did not constitute an abuse by Bankers Trust of the

fiduciary relationship. Bankers Trust imposed this condition upon the Hanson trust as a condition of Bankers Trust becoming a co-trustee. During those negotiations, there was no fiduciary relationship between Hanson and Bankers Trust.

Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990)

Wrongful Discharge

Employee adduced substantial evidence that his employer fired him for filing a workers' compensation claim. Employer argued that it had violated no public policy because, although it fired him, it did not interfere with his prosecution of a workers' compensation claim. On instructions, employer also objected to instruction that employee only had to prove that his workers' compensation claim was the "determining factor" in employer's decision to fire him.

HELD: "[R]etaliatory discharge violates public policy even if the employer does not interfere with the discharged employee's benefits." Instruction on "determining factor" was proper.

> [R]etaliatory discharge relieves the employer of his responsibility by intimidating employees into foregoing the benefits to which they are entitled in order to keep their jobs. This intimidation occurs even if retaliation is not the predominant purpose for the firing. If retaliation is allowed to weigh at all on the employer's decision to discharge, there will be a chilling effect on employees entitled to claim benefits. This would clearly conflict with the public policy expressed in section 85.18.

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Springer v. Weeks & Leo Co., _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Wrongful Discharge

In Springer I, the Court recognized a cause of action for the retaliatory discharge of an at-will employee, at least when "employment is terminated for reasons contrary to public policy." Springer had adduced substantial evidence in support of her claim that she was fired because she pursued a workers' compensation claim, and the Court reversed a directed verdict in favor of defendant. On retrial, defendant argued unsuccessfully that the Court's reversing language in Springer I - "We believe a cause of action should exist for tortious interference with the contract of

hire when the discharge serves to frustrate a well-recognized and defined public policy of the state" - required plaintiff on retrial to establish the elements of a tortious interference with contract in accordance with sections 766 and 766A of the Restatement (Second) of Torts. District court instead instructed in accordance with ICJI 3100.1 and required plaintiff to prove the following:

> 1. Plaintiff was an employee of defendant,
> 2. Defendant discharged plaintiff from employment,
> 3. Defendant discharged plaintiff because she filed a workers' compensation claim,
> 4. The discharge was a proximate cause of damage to the plaintiff, and
> 5. The nature and extent of the damage.

Jury awarded plaintiff $14,000 in lost wages and $5,000 for emotional distress. On appeal, defendant argued that the "tortious interference" language from Springer I constituted the law of the case.

The Supreme Court affirmed, disavowed all references in Springer I to the "interference" cause of action, and approved ICJI Instruction 3100.1. The court answered the "law-of-the-case" argument by holding that "an appellate court decision becomes the law of the case and is controlling . . . [unless it] has been clarified by judicial decisions following remand." Court listed all of the post-Springer I opinions in which it has referred to Springer's cause of action as "retaliatory or wrongful discharge."

TRIAL

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Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Argument

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

By instructions, district court disclosed in instructions that Mary's damages were $85,000 and, without disclosing the amount, disclosed that Mary had "resolved her claim" against Floyd County. Mary objected to these disclosures and appealed from the resulting judgment on those grounds.

HELD: Although Mary's suit arose before Chapter 668's enactment, its provisions with respect to disclosure of the impact of percentages and disclosure of Floyd County's true status should be applicable.

Because Mary's damages had already been determined, disclosing the amount was the only way to make instructions, evidence, and argument about the impact of the allocation any real meaning. District court's disclosure of Floyd County's status was accurate and necessary to explain "its conspicuous absence from trial."

Mary complained that Schwennen's counsel argued improperly in his closing that any fault attributable to William Abell should be assessed against Floyd County, because only Floyd County could have controlled William's actions (with signage). Mary's argument was hindered by her failure to have final argument reported and by her failure to prove, via a bill of exceptions under rule 241, but was actually said in final argument. As described by Schwennen's counsel on the record in his arguments on Mary's motion for new trial, counsel's argument was not improper.

Mary's effort to use juror affidavits to establish that jury considered William's fault was of no relevance, because the affidavits only went to the content of deliberations.

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Deposition

Witness returned to state from Florida to testify for plaintiff. Defendant subpoenaed witness, but witness returned to Florida after testifying in plaintiff's case in chief.

HELD: District court did not abuse its discretion in permitting defendant to introduce witness' deposition testimony, the content of which was neither irrelevant nor cumulative.

Mueller v. St. Amsgar State Bank, 465 N.W.2d 659 (Iowa 1991)

Directed Verdict

Failure to renew a motion for directed verdict at the close of evidence amounts to a waiver.

Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Examination

In dram shop case, plaintiff asked bar by interrogatory to disclose persons "who saw and conversed with" decedent on the night of his death and persons with knowledge of decedent's consumption of alcohol at the bar. At trial, defendant's bartender testified as to the presence of a person not listed in defendant's answer to interrogatory, and testified that this previously undisclosed person had asked the bartender "who Hobbiebrunken was." Plaintiff made no objection or otherwise complained of this alleged inconsistently between defendant's evidence and its answer to interrogatory until her motion for new trial.

HELD: Plaintiff's failure timely to object or request a continuance waived her right to complain about the alleged omission in defendant's answer to interrogatory. Moreover, the bartender's testimony did not establish that the "new" witness conversed with Hobbiebrunken or had any knowledge of his consumption of alcohol.

Lanz v. Pearson, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

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Examination

Defendant in car-accident litigation refused under work-product doctrine to produce copies of or disclose content of statements he made to his insurer. At trial, district court permitted plaintiff to ask defendant if he had made any statements about the accident, but refused to permit further questioning either for impeachment purposes or as a method of refreshing recollection.

After reversing the defense verdict for other reasons, the court noted for purposes of retrial that plaintiff was not entitled to the document absent the showing of substantial need in Rule 122(c), in accordance with Ashmead, 336 N.W.2d at 201. Court

rejected plaintiff's alternative argument that she was entitled to production of the statements at trial in order to refresh recollection, because plaintiff had not yet established that defendant was unable to testify without refreshing his recollection. Court does not suggest that refreshing recollection is a way around work-product, but simply notes that, assuming the document was otherwise available to plaintiff, plaintiff had not met the foundational requirements for using a document to refresh recollection.

Fuches v. S.E.S. Co., 459 N.W.2d 642 (Iowa App. 1990)

Instructions

Defendant leased scaffolding to plaintiff's employer for use on a construction site. Defendant supplied a frame by one manufacturer and planks by another, so there was not a secure fit. Defendant adduced evidence that an inspection by plaintiff prior to using the scaffolding would have disclosed the incompatibility and resulting risk of injury.

HELD: District court's failure to specify what plaintiff should or should not have done in instructions on general allegation by defendant that plaintiff failed to use ordinary care to avoiding an injury, requires new trial.

Bauer v. Cole, 467 N.W.2d 221 (Iowa 1991)

Instructions

In social host-underaged drinker case, plaintiff and defendant submitted requested instructions. Before receiving objections to the court's instructions, district court announced that (with two irrelevant exceptions) it was "overruling" the requested instructions. Plaintiff then made no further record on his requested instructions.

HELD: Plaintiff did not preserve error with respect to district court's failure to instruct as requested. District court properly required plaintiff to prove that social host "knowingly" supplied alcohol to plaintiff's driver.

Meck v. Iowa Power & Light Co., 469 N.W.2d 274 (Iowa App. 1991)

Instructions

Meck was employed as a millwright by APM, which had a labor and services contract with Iowa Power under which APM was to supply millwrights to perform maintenance at Iowa Power's plant.

Contract between APM and Iowa Power provided that the millwrights were to perform under the direction/supervision of Iowa Power. Meck was injured in the course of his employment for APM while working at Iowa Power's plant, when a conveyor belt on which he was standing began to move.

Meck adduced evidence that Iowa Power had over four miles of belts at the site to transport coal to its generators. The belts are operated from a remote control room that is not in visual contact with the belt on which Meck was standing. Iowa Power usually kept an employee on the floor to verify that such belts are clear before they are started. No such personnel was present at the time of Meck's accident. Meck also adduced substantial evidence that the warning horn in Meck's vicinity may have worked only intermittently and that Iowa Power knew or should have known of same. Another employee attempted to alert the control room of Meck's precarious situation before the belt was activated, but his radio did not work. Without disclosing the content of the instructions, the Court of Appeals held that Meck had adduced substantial evidence in support of his claim against Iowa Power for negligence, and that the jury instructions adequately instructed on Iowa Power's duty of care with respect to Meck.

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Instructions

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William.

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The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

By instructions, district court disclosed in instructions that Mary's damages were $85,000 and, without disclosing the amount, disclosed that Mary had "resolved her claim" against Floyd County. Mary objected to these disclosures and appealed from the resulting judgment on those grounds.

HELD: Although Mary's suit arose before Chapter 668's enactment, its provisions with respect to disclosure of the impact of percentages and disclosure of Floyd County's true status should be applicable.

Because Mary's damages had already been determined, disclosing the amount was the only way to make instructions, evidence, and argument about the impact of the allocation any real meaning. District court's disclosure of Floyd County's status was accurate and necessary to explain "its conspicuous absence from trial."

Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991)

Instructions

Nichols and Schweitzer were operating vehicles in the same direction on state highway. Nichols moved into left land to pass Schweitzer who was stopped, slowing down, or stopping. Nichols did not return to his lane before striking an oncoming vehicle operated by West in the left lane. Nichols was killed, and West was injured. Nichols' estate and West sued Schweitzer.

At trial, district court instructed in accordance with section 321.316, which provides:

> A driver shall not stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal to the driver of any vehicle immediately to the rear when there is an opportunity to give the signal. The signal shall be given by either extending the hand and arm downward from the left side of the vehicle or by a brake light . . . .

Schweitzer objected to this instruction because there was no evidence that she stopped or "suddenly decrease[d]" the speed of her vehicle, one of which must be present to trigger section 321.316. There was no direct evidence that Schweitzer's brake lights were inoperable. Accordingly, if she had experienced a sudden decrease in speed, her brake light would have been on. Schweitzer's testimony was to the effect that she saw the oncoming traffic and the narrow bridge between her and the traffic. She tapped her brakes to release the cruise control and coasted to 35 m.p.h. to let oncoming traffic clear the bridge. Only then did she notice Nichols passing her on the left.

HELD: District court properly instructed on section 321.316, because substantial evidence supported West's and Nichols' claims that Schweitzer either stopped or slowed suddenly. Nichols and West adduced accident reconstruction testimony that, if believed, rendered Schweitzer's version impossible. They also adduced testimony that Schweitzer was completely stopped on the highway and that Nichols passed her on an emergency basis.

Doe v. Johnston, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Jury

In medical-malpractice case, jury voted 7-1 in favor of defendant on fifth day of deliberations. Dissenting juror contacted plaintiff's counsel and disclosed that another juror had brought in a cartoon depicting a judge's instruction to a jury: The verdict should be guilty or not guilty. There's no provision for guiltyish." Plaintiff filed the juror's affidavit, which included a statement that the cartoon influenced the jury's vote in favor of defendant. Defendant submitted seven affidavits that the cartoon had no impact upon the vote.

HELD: The court may consider affidavits to determine whether extraneous matter was brought to the jury room, but may not consider affidavits for purposes of deciding, by an objective standard, whether the misconduct prejudiced the deliberations. "We decline the invitation to" adopt a rule presuming prejudice from introduction of extraneous material into deliberations. District court did not abuse its discretion in concluding that cartoon had not prejudiced deliberations.

Meirick v. Weinmeister, 461 N.W.2d 348 (Iowa App. 1990)

Jury

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Individual jurors in a medical malpractice case related their personal childbirth experiences during deliberations. Plaintiff moved for new trial. HELD: Even if jurors' conduct was outside the proper bounds of deliberations, district court was within its discretion in finding that the Plaintiffs did not prove that such conduct was "designed to and with reasonable probability did influence the jury verdict."

Hobbiebrunken v. G & S Enterprises, Inc., 470 N.W.2d 19 (Iowa 1991)

Jury

Plaintiff's decedent bar-hopped by boat along the shore of Clear Lake. Eventually, he drove his boat into an unlighted dock and was killed. His blood alcohol level was .382. Plaintiff sued several bars, and went to trial against one. Jury returned a defense verdict.

Plaintiff moved for new trial and submitted juror affidavits to the effect that some jurors examined decedent's recent tax returns and other financial information (presumably exhibits) and decided that plaintiff and her children would be able to get along without recovery in this lawsuit. The affidavits also disclosed that some jurors speculated about plaintiff's receipt of social security benefits for her children, that the bar would have risked the loss of a good customer if it had refused to serve decedent, and that decedent "was probably trying to pick up one of the college women" who was on the boat at the time of the fatal accident. District court denied plaintiff's motion for new trial.

HELD: Affidavits do not establish misconduct but instead relate strictly to the deliberation process. Under rule 606(b) and Ryan v. Arneson, 422 N.W.2d 491 (Iowa 1988), jurors cannot testify by affidavit or otherwise about the deliberative process, except to establish that "extraneous prejudicial information was improperly brought to the jury's attention" or that "outside influence was improperly brought to bear upon any juror."

Ragee v. Archbold Ladder Co., 471 N.W.2d 794 (Iowa 1991)

Jury

In products liability case, counsel and court left for their respective homes/offices after case was submitted to jury. During deliberations, jury communicated two questions to court attendant, who telephoned the judge and read them. Without contacting counsel, the judge dictated responses back to the attendant, who conveyed the judge's responses to the jury.

HELD: Violation of rule 197's procedure for communications between court and jury in civil case does not invalidate verdict unless complaining party establishes (1) procedure utilized by the court in communicating with the jury has compromised the integrity of the judicial system, or (2) complaining party was prejudiced by the failure to comply with rule 197. Defendant concedes that the substance of the court's responses was acceptable, such that an opportunity to participate before the communications occurred would not have changed them. As to the first element, the court's procedure did not create any appearance of impropriety.

Schwennen v. Abell, 471 N.W.2d 880 (Iowa 1991)

Jury

William Abell was injured when the vehicle he was operating collided with a vehicle owned by John G. Schwennen and operated by John Karl Schwennen. John G.'s estate (he was a passenger in his own vehicle and was killed) sued William Abell. William counterclaimed for his own injuries. In a separate action, William's wife Mary sued John G.'s estate and Floyd County for loss of spousal consortium. The two lawsuits were consolidated for trial.

Jury apportioned 63% to William, 27% to Schwennen, and 10% to Floyd County. Jury found Mary's damages to be $85,000. District court reduced Mary's damages by the 63% allocated to husband William.

The Supreme Court held that William's fault should not be allocated to Mary. The Court let stand the $85,000 verdict, but remanded for apportionment of fault between only Schwennen and Floyd County. See Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988). On retrial, jury apportioned 15% to Schwennen and 85% to Floyd County. District court entered judgment in favor of Mary and against Schwennen for $12,750.

HELD: Mary's effort to use juror affidavits to establish that jury considered William's fault was of no relevance, because the affidavits only went to the content of deliberations.

Nichols v. Schweitzer, 472 N.W.2d 266 (Iowa 1991)

Jury

Nichols and Schweitzer were operating vehicles in the same direction on state highway. Nichols moved into left land to pass Schweitzer who was stopped, slowing down, or stopping. Nichols did not return to his lane before striking an oncoming vehicle operated by West in the left lane. Nichols was killed, and West was injured. Nichols' estate and West sued Schweitzer and each other.

At the beginning of trial, district court granted Nichols four strikes, West four strikes, and Schweitzer six strikes. At that point, West and Nichols had settled their claims against each other, but they were still adverse on the issue of fault because of their claims against Schweitzer.

HELD: District court did not abuse its discretion in attempting to balance and order the strikes of multiple parties.

Grodt v. Darling, 472 N.W.2d 845 (Iowa App. 1991)

Jury

Grodt and Darling were involved in an automobile accident. Grodt and his wife sued Darling. Jury returned a verdict finding Grodt 60% at fault and Darling 40% at fault and a verdict in favor of Darling on Mrs. Grodt's claim for loss of consortium.

At the end of trial, the parties agreed to a sealed verdict. When the jury returned with its verdict, the judge determined that the jury had failed to complete the verdict form for Marjorie Grodt's claim. Immediately, and without consulting counsel, the judge directed the jury to return to the jury room and complete the verdict forms.

HELD: The district court acted properly in correcting the technical omission, which was discovered before the jury was excused.

Ragee v. Archbold Ladder Co., 471 N.W.2d 794 (Iowa 1991)

Motions

Plaintiff fell from ladder manufactured by defendant and commenced action to recover for her injuries. At close of plaintiff's case in chief, defendant moved for directed verdict on plaintiff's theory of res ipsa loquitur. Defendant urged two grounds in support of its motion: (1) plaintiff failed to introduce evidence establishing defendant's exclusive control of ladder at the time of the negligent act, and (2) plaintiff had failed to negate that her injury was a result of her own actions. District court overruled defendant's motion. Defendant renewed its motion at the close of all evidence, and again district court overruled it. After verdict, defendant moved for judgment n.o.v., arguing "that res ipsa loquitur does not apply when direct evidence as to the precise cause of the injury exists." District court overruled defendant's motion. On appeal, defendant argued only the theory presented in its motion for judgment n.o.v.

HELD: Defendant cannot raise on motion for judgment n.o.v. arguments not raised in its motions for directed verdict.

Alden v. Genie Industries, _____ N.W.2d _____ (Iowa, Sept. 18, 1991)

Co-Employee Gross Negligence

School maintenance department employees Alden and Gibbs were using a manlift to paint flag poles and light poles. The manlift was equipped with stabilizing outriggers, but Alden and Gibbs were not using them because they were operating the manlift from the back of a pickup truck, which provided them with extra height and better mobility. Plaintiff adduced evidence that Alden's and Gibbs' supervisor, Dick Justice, was aware of their use of the manlift without the stabilizing outriggers and directed Gibbs (Alden was not present) to continue the project, despite Gibbs' concerns about the windy conditions. Gibbs and Alden proceeded on the day in question, and Alden was in the lift when it blew over. Alden was killed.

HELD: Plaintiff adduced substantial evidence that Justice knew or should have known that his direction placed Alden in a zone of imminent danger. While Justice denied knowledge of Alden's and Gibbs' use of the manlift without the stabilizing outriggers, he readily admits that such operation was unsafe, even on a windless day. Because plaintiff adduced substantial evidence that Justice knew of the manlift's improper use and even directed them to continue it, the district court should not have sustained Justice's motion for summary judgment.

Allied Mutual Insurance Co. v. State, 473 N.W.2d 24 (Iowa 1991)

Contribution

State employee Lund was a passenger in a state automobile driven by Smith when it collided with vehicle driven by Sailor. Lund sued Sailor. Sailor's insurer, Allied, settled with Lund. Allied then sued State and Smith for contribution and indemnity. State and Smith moved for summary judgment. District court sustained motion as to both defendants and as against all Allied's claims.

HELD: Lund and Smith are co-employees. Lund's sole remedy against Smith, therefore, requires proof of gross-negligence. In order to obtain contribution, Allied also must establish gross negligence, which it cannot do on this record. It was a simple car accident.

Because Lund's sole remedy against State is a workers' compensation claim, Allied cannot establish that it and the State have common liability to Lund. Common-liability requirement does not deny equal protection.

Meck v. Iowa Power & Light Co., 469 N.W.2d 274 (Iowa App. 1991)

Lien

Employee suffered a work-related injury, and sued the owner of the premises on which he worked. Employee received $80,000.00 in a special case settlement of his workers' compensation claim. At trial, defendant argued that it should receive a credit against the verdict in the amount of $80,000.00, because plaintiff's employer and insurer "lacked a valid workers' compensation subrogation lien." Section 85.22(1) requires the employer or insurer to file with the clerk of court notice of the lien within 30 days of receiving notice of the employee's suit from the employee.

District court rejected defendant's contention. "The district court held [the employer] and its insurer had a valid subrogation lien."

HELD: "[Employer's] insurer has a valid subrogation lien against Meck's recovery up to the extent of its payment, provided it has filed the necessary notice of the lien in this action." Iowa Power was not entitled to a credit.

COMMENT: Failure of employer or insurer to preserve the lien as required in section 85.22(1) only deprives the employer or insurer of the benefit of a lien, not the benefits of the subrogation interest.

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Nieman v. Heil Co., 471 N.W.2d 790 (Iowa 1991)

Lien

In a case governed by Goetzman instead of chapter 668, Nieman commenced a products liability action for a work-related injury. Nieman received $46,000.00 in workers' compensation benefits pursuant to a settlement agreement in which the employer and its insurer waived any claims for subrogation. After trial of the product liability action, the jury found Nieman to be 80% at fault. District court properly reduced his damages to $60,000.00.

Defendant applied for a credit in the amount of the workers' compensation payment. District court refused. HELD: Tortfeasor is not entitled to a credit for workers' compensation

benefits paid to civil tort plaintiff for work-related accident that is caused by tortfeasor.

> [T]here is a firm statutory foundation for applying this principle. Our workers' compensation statutes expressly preserve the right of an employee to bring an action against third parties who are legally responsible for injuries resulting in payment of workers' compensation. . . . [S]ection 85.22(1) provides that the employer or the employer's insurer, who has made compensation payments, shall have a lien on the claim and shall be indemnified out the recovery of damages. The employer's right to a lien and to indemnification from an award of damages against a third party presupposes the claimant's right to recover those elements of damage for which workers' compensation has already been paid.

March v. Pekin Insurance Company, 465 N.W.2d 852 (Iowa 1991)

Subrogation

The subrogation lien of section 85.22 does not extend to underinsured-motorist benefits received by the employee pursuant to a privately owned contract of insurance.

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I N D E X

Iowa Defense Counsel Association

1965 through 1990 Annual Meetings

This Index is supplied as a service to the members of the the Iowa Defense Counsel Association and will be updated annually. Entries in this Index refer to the title of the paper presented followed by the year of presentation.

Outlines for annual meetings of 1970, 1972, 1973, and 1974 were unavailable at the time of this printing and no papers for those years are included in this Index.

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